PUBLIC-PRIVATE PARTNERSHIPS, CONCESSIONS AND PUBLIC PROCUREMENT LAW

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ABSTRACT. Public private partnerships have been developed in several areas of the public sector and are widely used within the EU and the rest of the world, in particular in transport, public health, public safety, waste management and water distribution. In times of tight public budgets their importance can hardly be underestimated. Public Private Partnerships come in different forms. This paper is concerned with the instrument of the concession as a form of public private partnership. Concessions have long been used in certain Member States, particularly to carry out and finance major infrastructure projects such as railways and large parts of the road network. Due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, the interest in concessions has been heightened over the last few years.
The article explains from a legal point the main characteristics of concessions and its legal regime. It also explains why there is a need for the regulation of concessions and why a broader interpretation of the notion of concession, especially in the context of Public Private Partnerships, is to be preferred.

INTRODUCTION

With the explosion of public-private partnerships (PPPs) in the late 1990s, both in Europe and around the rest of the World there is a temptation to think that PPPs are a relatively novel concept, and one for which ingenious lawyers and bankers of the 1990s can take most of the credit. This is, however far from being true. Indeed there is early

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evidence of at least one form of PPPs being actively used during Roman times and earlier still (Blondeau, 1929; Bettinger, 1978; Bezancon, 2004; Van Garsse, 2007). According to scholars, 'concessions' were used for designing, financing, building, operating and maintaining ports and aquaducs (Blondeau, 1929; Bettinger, 1978; Bezancon, 2004; Van Garsse, 2007). In modern times too there is plenty of evidence of PPPs being used to realize and finance projects around the world. In the 19th century in Belgium, Spain and France road and railway concessions were granted to private partners (Blondeau, 1929; Bettinger, 1978; Bezancon, 2004; Van Garsse, 2007). Other more famous examples include the concession for the construction and operation of the Eiffel Tower in Paris and the Suez Canal in Egypt. The use of these and other types of public-private partnerships nonetheless faded away in most countries after the 19th century, as the role of the state expanded, governments began to prefer to be directly involved in the provision and management of infrastructure and public services, civil service administrations increased and state owned companies were founded. The disuse of PPPs only began to reverse in the 1980s, especially with the launch of the Private Finance Initiative in the United Kingdom. Due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods soon many countries followed developing PPP programmes including concession arrangements. Nowadays PPPs are increasingly popular as a way of procuring, financing and maintaining public sector infrastructure in sectors such as roads, bridges, railways, ports, schools, prisons and social housing (Merna & Lamb, 2003; Montanheiro, Berger & Skomsoy, 2002). Examples include the French Perpignan-Figueras high speed train link, the Brussels North waste water facility, the Spanish concession roads, the Australian Sydney Harbour bridge, etc.

This article first deals with the different legal forms of (contractual) public private partnerships and explains their relevance as to public procurement law. It then goes on to examine the definition and main characteristics of concession type arrangements that are used to structure public private partnerships and to differentiate concession type arrangements from (traditional) public contracts. Last but not least it explains why a legislative framework for concessions is needed and it provides a brief overview of what concession laws should contain. The article ends with a conclusion.

FORMS OF PUBLIC-PRIVATE PARTNERSHIPS

In legal literature, the definition of the "Public-Private Partnership" covers all forms of long term co-operation between public authorities and the private sector. Characteristics of a PPP include (European Commission, 2004):

- The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
- The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.
- The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.
- The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

Scholars submit that there are two types of PPP : PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity (Bult-Spiering & Dewulf, 2007).

It is also stated that (contractual) public-private partnerships, the most important form of PPPs, cover two types of interaction between the public and the private spheres: public contracts and concessions.[1] Recently more and more scholars and even the European Commission further state that the main difference between the two can be found in the financial relationship between the public authority, the private partner

and the citizens being the users of an infrastructure or a service. Under a public contract the public authority pays the private partner, whereas in the context of a concession, users pay their contributions directly to the private company (fees, transport tickets etc) (European Commission, 2004; Van Garsse, 2007).

This distinction between public contracts and concessions in the context of PPPs seems, apart from the payment mechanism, at first sight logical and self-evident as it can be submitted that only public contracts are regulated by public procurement law.

PUBLIC PROCUREMENT LAW AND THE REGULATION OF CONCESSIONS

As one may know (traditional) public (procurement) contracts are very highly regulated all over the world. The question arises to what extent public procurement law applies to concession contracts. The answer to this question is very contentious. Let us take for example the General Procurement Agreement (GPA) negotiated during the Uruguay Round (1986-1994) which entered into effect on 1 January 1996 and is open only to WTO member States. This plurilateral agreement applies to government contracts and has a very broad scope. It applies to all forms of government procurement covering all contractual forms, such as purchase, hire purchase, leasing, etc. (GPA art. I.1 en I.2). The question very quickly arose if and to what extent concessions were covered. The disagreement and differences regarding this matter recently manifested themselves in a working group charged with the study and preparation of a new agreement, under the WTO, regarding the transparency of government procurement (Working Group on Transparency, 2000, 2002). According to some, concessions could not be regarded as government procurement. Others pointed out the difference in nature between public contracts and concessions, and the fact that in most law systems concessions are regulated separately. Still others put the differences into perspective. Why should we not be able to regard concessions, or at least some forms of concessions, as a form of government procurement? In the end, the main difference lies in the method of remuneration (Working Group on Transparency, 2000).

There also continues to be disagreement in the legal theory, specifically as far as the GPA is concerned (Arrowsmith, 2003; Van

Garsse, 2007). Especially the broad area of application seems to argue in favour of applying the GPA to concessions (Neumann, 2001). The better view is probably that concessions are excluded. It can indeed not be denied that there are strong arguments for exclusion. Firstly it was probably not the intention of several Member States to regulate the concessions through this agreement. In fact, as mentioned earlier, many Member States have introduced specific laws for concession agreements. Examples include inter alia Russia, France, the Philippines, Italy, Bulgaria, Spain, Serbia and Montenegro (Van Garsse, 2007).

Moreover, the GPA is found to be extremely detailed. If the idea was to regulate concessions, specific regulations and possibly even specific procedures would probably have been included (Pijnacker-Hordijk, Van Der Bend & Nouhuys, 2004). As a matter of fact, in this context reference can be made to the UNCITRAL Guide which states that international experience in the award of privately financed infrastructure projects has in fact revealed some limitations of traditional forms of competitive selection procedures (Uncitral, 2001). Laws on competitive procedures for the procurement of goods, construction or services may not be entirely suitable for privately financed infrastructure projects, it also adds. In this respect, we should not be surprised that UNCITRAL itself nowadays has a different set of “model provisions” for public procurement contracts and for BOT-projects. After having adopted a Model Law on Procurement of Goods, Construction and Services, it adopted, a Model Legislative Provisions on Privately Financed Infrastructure Projects on 7 July 2003.

The idea that public procurement law is in general not applicable to concessions can also be found in European law. A “works” concession is defined in Directive 2004/18 as "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 work or in this right together with payment." This definition is very interesting because it directly relates concessions to (traditional) public (procurement) contracts. At the same time it makes clear that both notions are also different. What is more, in European law, a distinction is even to be made between service concessions and public works concessions. Indeed, in the current EU framework, works and services concessions are subject to different sets of rules. The European procurement 2004/18 directive lay down specific provisions for public works concessions.[2] The rules are much less onerous than those for

works contracts. The only procedural obligation imposed upon the authority awarding the concession is a requirement to publish a notice in the official journal, advertising the authority's intention to award the concession. The firm or consortium which wins the concession has also specific obligations. Everything depends on whether or not the concessionaire is itself a contracting authority. If the concessionaire is a contracting authority, works contracts awarded to third parties must follow all the Directive's provisions. If the concessionaire is not a contracting authority, it needs only to apply some of its rules on advertising, time limits for requests to participate and for receipt of tenders. Directive 2004/18/EC clarifies what is meant by "third parties" in this context and in particular that this excludes undertakings which have formed a group to bid for the concession and undertakings related to these. Apart from these advertising requirements, the procurement directive imposes no further procedural obligations on either the awarding authority or the concessionaire. Thus concessions are not subject to the various provisions regarding prequalification, choice of procedure, etc. In the case of service concessions, there is no secondary EU legislation. Service concessions are explicitly excluded in article 17 of the directive.

However to avoid any misunderstanding, this does not mean that these concessions are not subject to the rules and principles of the European Community Treaty. Their award is subject to the – in some case vague- principles which derive from Court Case law and to the general principles of the EC Treaty including in particular the principles of transparency, equal treatment, proportionality and mutual recognition ("Commission interpretative communication," 2000). According to the European Commission the rules resulting from the relevant provisions of the Treaty can be summed up in the following obligations: fixing of the rules applicable to the selection of the private partner, adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure, introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question, compliance with the principle of equality of treatment of all participants throughout the procedure, selection on the basis of objective, non-discriminatory criteria ("Commission Green paper," 2004). Surely those same rules are to be applied to public works concessions where, as said, only certain advertising obligations, intended

to ensure prior competition by interested parties apply and where the contracting bodies are free to decide how to select the private partner.

DEFINITION AND CHARACTERISTICS OF CONCESSIONS

It was made clear earlier that within PPPs the distinction between concessions and public contracts seems to make sense as other rules (may) apply. The problem quickly arises of how to differentiate concessions from "public contracts". As seen more recently there is a tendency in European literature to assume (?) that the distinction lies in the fact that in the context of a concession, users pay their contributions directly to the private company (fees, transport ticket), whereas under a public contract the public authority pays the private partner. However this point of view is simply not correct.

Let us start by looking at the European directives on public procurement law. In reality the European directives define a concession as a contract of the same type as a public works/services contract except for the fact that the consideration for the works/services to be carried out consists either solely in the right to exploit the work/the services or in this right together with payment.

Firstly, the Directive does not state that no remuneration can be paid by the contracting authority. On the contrary, it confirms that the right of exploitation can be accompanied with payment. Therefore a set up could still be a concession if, for example, the fees are subsidised.[3] Moreover there is no reason to exclude arrangements where the contracting entity is the only source of income for the concessionaire. The textbook example is a road concession with shadow toll. Shadow toll involve payment per vehicle using a kilometre of the project road in accordance with a pricing structure. They are shadow toll, as opposed to real tolls, because the payment for usage is made by the government rather than the road user (Grimsey & Lewis, 2004). Legal scholars have accepted that such a method of remuneration is also eligible for designation as a concession (Linotte & Cantier, 2000). Indeed, the Directive does not at any point stipulate that the revenue must come from third parties. What is more, it is nowhere stipulated that the beneficiary of the service or the work must be a third party rather than the awarding entity itself. In theory, the text of the Directive thus does not seem to exclude situations in which the government is the sole user and the sole party paying a remuneration

from the concept of concession, at least insofar as there is an actual exploitation by the concessionaire.

Secondly, it is quite generally assumed that if the concessionaire does not bear the risk of exploitation because for example the contracting authority guarantees that all the investments will be paid off and that the private partner will have a profit ("Commission interpretative communication," 2000), this is no longer considered a concession. Therefore even supposing the remunerations have to be made entirely or partially by third parties, this is most certainly not sufficient to be considered a concession under European Law.

Thirdly, historically speaking the concept of works and service concessions was interpreted much more widely in European countries, such as France and Belgium (Bezancon, 2001). One can find the remains of this in the current definition of the French "contrat de delegation de service public." The "contrat de delegation de service public" is defined by law as a contract under which a public authority grants the management of a public service to a public or private entity for a remuneration that is substantially linked to the results of the service.[i] A decision of the highest French administrative court seems to indicate that if at least 30 percent of the revenues come from the operation of the project, a significant part of the exploitation risk will have been transferred to the private party, and therefore the contract will be a "delegation de service public."[ii]

Moreover, from an international perspective one must admit that in reality there is no universally accepted definition of a concession. Hence the difficulty of defining the term concession has been addressed by the United Nations Commission on International Trade Law (UNCITRAL) in its Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and the European Union in its interpretative communication on concessions under Community law.[iii]

Comparative research shows nonetheless that a distinction can be made between several types of concession.[iv] First of all there is the "concession domaniale": a contract whereby a government agrees that government property, often called public domain, can be privately used. This type of contract is very common in civil law jurisdictions and is often seen as an "administrative contract" or a special contract governed by administrative law.

Secondly there is the concession for the exploitation of natural resources, such as mining, oil or gas. These type of concessions are in practice "licences" or "permissions" issued by the public authorities of the host country.

When referred to in the context of public-private partnerships the term concession is mostly used in combination with the words (public) service or public works. This is in fact the third type of concessions. This category can probably be subdivided into (simple) leases ("affermages") which cover operating and maintaining but do not involve project financing (for example because the infrastructure already exists or because the contract only deals with public services) and infrastructure concessions where the private sector takes responsibility for funding, building and operating the project. Other commonly used expressions for this last type of projects include terms such as Build-operate-transfer (BOT).[v] A project is said to be a BOT project when the contracting authority selects a concessionaire to finance and construct an infrastructure facility or system and gives the entity the right to operate it commercially for a certain period, at the end of which the facility is transferred to the contracting authority; Build-transfer-operate (BTO). This acronym is sometimes used to emphasize that the infrastructure facility becomes the property of the contracting authority immediately upon its completion, the concessionaire being awarded the right to operate the facility for a certain period; Build-own-operate (BOO). This expression refers to projects where the concessionaire owns the facility permanently and is not under an obligation to transfer it back to the contracting authority. Build-rent-operate-transfer (BROT) or "build-lease-operate-transfer" Build-own-operate-transfer (BOOT). These are projects in which a concessionaire is engaged for the financing, construction, operation and maintenance of a given infrastructure facility in exchange for the right to collect fees and other charges from its users. Under this arrangement the private entity owns the facility and its assets until it is transferred to the contracting authority; Besides acronyms used to highlight the particular ownership regime, other acronyms may be used to emphasize one or more of the obligations of the concessionaire. The expression "design-build-finance- operate" (DBFO) is for example sometimes used to emphasize the concessionaire's additional responsibility for designing the facility and financing its construction.

A lot of attempts were made to define these last kind of concessions.[vi] Although it is difficult to define concessions in a way that

would encompass all the different interpretations that exist, most of these definitions are quite broad and embody probably the most common concession type arrangements that can be used for PPPs. The European Bank for Reconstruction and Development (EBRD), a financial institution that was established in 1991 when communism was crumbling in central and eastern Europe and ex-soviet countries needed support to nurture a new private sector in a democratic environment, defines the concession as an act attributable to the State whereby a contracting Authority entrusts to a third party the total or partial management of services for which that authority would normally be responsible and for which the third party assumes all or part of the risk. Concession/PPP include all forms of cooperation between public authorities and a world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service, except the sale of assets/privatisation.[vii]

Also very interesting is the UNCITRAL Guide on Privately Financed Projects and its legislative recommendations and model legislative provisions. UNCITRAL is a subsidiary body of the United Nations General Assembly. It was established in 1966 with the general mandate of furthering the progressive unification and harmonisation of the law of international trade. At its thirty-third session it adopted the UNCITRAL legislative Guide on Privately Financed infrastructure projects. This Guide is a reference that national authorities and legislative bodies may use when preparing new laws or reviewing the adequacy of existing laws and regulations. In its introduction the guide makes it clear that it apply to infrastructure projects that involve an obligation, on the part of the selected investors, to undertake physical construction, repair or expansion works in exchange for the right to charge a price, either to the public or to a public authority, for the use of the infrastructure facility or for the services it generates[viii] The model legislative provisions even contain a definition of the term “concession contract”. A Concession contract means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project.[ix] In the travaux preparatoires it was stated that the use of the words concession contract as compared to the notion of project agreement, which was used in the Guide would have the advantage of facilitating the incorporation of the model legislative provisions in domestic legal systems, since the term concessions agreement, which was in the past

more widely used in civil law jurisdictions only, is being increasingly used in common law jurisdictions as well.[x]

As one can see in an international context the so-called distinction between concession type PPPs and public contracts PPPs is blurred very quickly. How to qualify for example the more recent road projects all over Europe based on availability payments and performance payments.[xi] Unavailability includes a section of a road being closed for maintenance by the concessionaire or a third party and blockages due to it not being operated to a specific standard. Performance payments cover aspects such as relating payments to the operators successful performance of individual tasks (e.g. surface conditions, maintenance, lighting, etc.); and to the operator achieving key overall objectives. Usually objectives would be set as predetermined outputs measured against pre-specified key performance indicators. [xii]The payment stream by these means will vary depending on whether and to what extent each of the key performance indicators is met.[xiii] Similar applications can be found in PPP projects for prisons and hospitals.

Differentiating works and services concession type arrangements from other (public) works or services contracts is therefore difficult and even artificial in the context of PPPs. In fact, when we use a (defendable) broader interpretation of the notion of concession and use "a multi-criteria analysis" (duration, risk, integrated approach, etc.) to identify works and services concession type arrangements it soon becomes clear that the only distinction one can make that really makes sense is a distinction between traditional public procurement contracts for works and services and works and services concession type PPP arrangements, that is to say "contractual PPPs".

In fact concession type PPP contracts share the following characteristics:

- long duration,
- different responsibilities,
- advanced risk allocation,
- finance component,
- based on functional specifications, and
- life cycle approach.

As opposed to traditional public works or services contracts. These normally have:

- short duration,
- single object,
- traditional risk pattern, and
- based on technical specifications.

Moreover the characteristics of concession arrangements result, as stated earlier, in the need for somewhat different and sometimes more flexible rules.

Why then does the European Commission, for example, try to force itself into artificial distinctions? In light of the non-applicability of traditional public procurement law and international public procurement rules and, on an international and European level, a lack of specific binding rules for concessions, things are easy to understand. International and European legislators or scholars should therefore not put too much effort in how to differentiate contractual PPP models or how to distinguish concessions from public works or services contracts. More relevant and a lot easier to distinguish are traditional public contracts as opposed to complex PPP contracts, that is to say concession type PPP arrangements. What is therefore needed is a binding international and/or European framework for concession type arrangements. A lot of international initiatives and recent national initiatives lead the way.

THE NEED FOR A LEGISLATIVE FRAMEWORK FOR CONCESSION TYPE ARRANGEMENTS

Now that more clarity was provided about the distinction between traditional public contracts and (works and service) concession type arrangements, that it was mentioned that concession type arrangements (need to be and) are subject to other regulations, the question arises as to what regulations should be drawn up and what should be incorporated into the concession laws. As stated many (recent) initiatives show the way.

In fact when studying the different national concession regulations, there is one element that strikes us, namely that many concession laws are of a recent date or have recently been adjusted, and that they show

many similarities.[xiv] This is not so surprising, as these past years several efforts were made to promote and harmonise concession law.

In early 2000, under the auspicies of the Organisation for Economic Cooperation and Development (OECD) managed Centre for Private Sector Development in Istanbul an expert group was formed with the objective of preparing Basic Elements of a Law on concession Agreements. The main objective of this document was providing a reference for governmental authorities and Parliaments in preparing new laws or reviewing the adequacy of existing concession laws and regulations. The Basic Elements were circulated and disseminated in 2002. One other example is the already mentioned UNCITRAL Guide and its model legislative provisions. The model legislative provisions are intended to further assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. The model provisions consist, as the Basic Elements, of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.

In general comparison learns that the model laws and national concession laws contain provisions such as the scope of the concession law, the power of the granting authorities, the award process and procedure, and the contents of the concession agreement.

The Scope of the Concession Law

Often the laws and models clarify the nature and purpose of the projects for which concessions may be awarded. There are probably two options[xv]: the first approach is to define the various categories of projects according to the extent of the rights and obligations assumed by the concessionaire (design, build, long term maintenance, advanced risk sharing, private finance, ..). An alternative is that the law provides that concessions may be awarded for the purpose of entrusting an entity, private or public, with the obligation to carry out infrastructure works and deliver certain public services, in exchange for the right to charge a price for the use of the facility or premises or for the service or goods it generates, or for other payment or remuneration agreed to by the parties. The law could further clarify that concessions may be awarded for the construction and operation of a new infrastructure facility or system or for maintenance, repair, refurbishment, modernization, expansion and operation of existing infrastructure facilities and systems, or only for the management and delivery of a public service.

The Power of the Granting Authorities

The laws and model laws contain specific provisions specifying the power of contracting authorities to enter into concessions minimising uncertainty and legal challenges. [xvi]

The Award Process and Procedures

As recommendation 14 of the UNCITRAL Guide points out the law (on concessions) should provide for the selection of the concessionaire through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects. Naturally, certain principles taken from the regulation of public procurement contracts can be applied by analogy. Most laws and legal provisions therefore contain selection procedures which present some of the features of the principal methods for government procurement. A number of adaptations have nonetheless been introduced to take into account the particular needs of concession projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria, scope for negotiation, etc.[xvii] In fact, most of the time concession projects raise particular issues. The UNCITRAL Guide inter alia points out that, given the complexity of the projects, the contracting authority may wish to limit the number of bidders from whom proposals may subsequently be requested. Moreover bidders may be reluctant to participate if the competitive field is too large. The contracting authority may furthermore be unable to identify the technical solutions for its problem and may prefer to leave to the private bidders the responsibility for proposing the best solutions for meeting the need. The contracting authority will also aim at formulating qualification and evaluation criteria that take account of the long duration of the concession project, the need for continuous service provision, etc. Last but not least, the contracting authority may want to negotiate with bidders. The complexity and long duration makes it unlikely that the conceding entity and the bidder could agree on the terms of the concession agreement without negotiations and adjustments to adapt the contract to the particular needs of the project.

Direct negotiations (with one party) are, as with traditional government procurement, only allowed in limited cases (emergency, single source of technology, national security, etc.). These cases do in principle not include unsolicited proposals. This changes when the proposal is unique and no reasonable alternative or substitute exist. In

some national concession laws specific provisions were adopted to deal with unsolicited proposals. Examples include concession legislation of Spain and the Philippines.[xviii]

The Contents of the Concession Agreement

Concession legislation often contains provisions regulating the content of the concession (methods of payment, duration, assignment of the concession, transfer of controlling interest, settlement of disputes, etc.).[xix]

CONCLUSION

Historically, concessions have provided an important means for private parties to provide public services and infrastructure all around the world. More recently, concessions of works and services mainly receive attention as an important instrument for public private partnerships. Public private partnerships are a form of long-term cooperation between the public and the private sector. Literature suggests that contractual PPPs can be divided into two categories: concessions and public contracts. Only the latter are regulated by public procurement law. The distinction is nonetheless problematic. There is no uniform and generally accepted definition for concessions. Moreover the traditional views which link the concept of concession to revenues that are received from third parties in any case seem too limited and even incorrect. Also from an international perspective the distinction between concessions and public contracts as a contractual form of PPP seems problematic to maintain, as a broader interpretation of the notion of service and works concession based on a multi-criteria analysis leads to the conclusion that "concession type PPPs" and "other contractual PPPs" have the same characteristics. Moreover laws on competitive procedures for the (traditional) procurement of goods, construction or services are not entirely suitable for PPP (works and services) projects. It is therefore suggested that (international and European) legislators and scholars should not put too much effort in how to differentiate contractual PPP models or how to distinguish service and works concessions from public works or services contracts. More relevant and a lot easier to distinguish are traditional public contracts as opposed to complex PPP/concessions contracts, that is to say "concession type PPP" arrangements. What is needed is a binding (international and/or European) legal framework for

works and services concession type arrangements. As for the concrete regulation of these concession type arrangements, recent similar national and international initiatives show the way. In fact, several non-binding international initiatives were successfully launched to promote best practice and harmonise concession law. The time has come to go one step further and to regulate concessions on an international and/or European level.

NOTES

1. European Committee on local and regional democracy, Preparation of a report and guidelines identifying good practice in the relationship between local/regional authorities and the private sector, LR-GR(2008)4
2. See *title III of Directive 2004/18* (*30.4.2004)*. OJ L 134.
3. In practice conceding authorities grant various advantages to the concessionaire. For example:

   - interest support to ensure a minimum level of interest for subscribers of bond subscription;

   - investment subsidies for financing works.

   - indemnities to cover unforceable costs.

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[i] "Loi Murcef", (12 december 2001). *JO*. (11 december 2001).

[ii] C.E. (30 june 1999). Smitom, *A.J.D.A.* 1999, 714.

[iii] *United Nations Commission on International Trade Law Thirty-sixth session Vienna* (30 June-11 July 2003). note by the secretariat, A/CN.9/533.

[iv] Dankers – Hagenaars. (2000). O*p het spoor van de concessie,* Den Haag Boom: Juridische uitgevers, 366.

[v] See inter alia: Unido, *Guidelines for infrastructure Development through Build-Operate-Transfer (BOT) projects*. (2001). Vienna, United Nations.

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[vi] See for example Grimsey, D., & Lewis, M. K. (2004). *Public-Private Partnerships.* Cheltenham, Edward Elgar. *The worldwide Revolution in Infrastructure Provision and Project Finance*, xi: concession-based approaches are the oldest form of public private partnership, and a variety of arrangements are based on the concept of a fixed term concession, using various combinations of private sector resources to design, construct, finance renovate, operate and maintain facilities. Ownership of the facility remain with the government or be transferred to the government on completion of the construction or at the end of the concession period.

[vii] *EBRD, (2006). Concession LIS, Final Report (December 2006).* Gide Loyrette Noel, 4.

[viii] Uncitral, (2001). Legislative Guide in Privately Financed Infrastructure Projects, United Nations, New York.

[ix] Uncitral, (2004). Model Legislative Provisions on Privately Financed Projects, United Nations, New York, model Provision 2 e.

[x] United Nations Commission on International Trade Law. *Report of the Working Group on the work of its fifth session* (9-10 september) session Vienna, 30 A/CN.9/521,55.

[xi] Grimsey, D. & Lewis, M. K. (2004). *Public Private Partnerships. The Worldwide Revolution in Infrastructure Provision and Project Finance*, Edward Elgar, 62.

[xii] Ibidem.

[xiii] Ibidem.

[xiv] Van Garsse, S. (2007). *De concessie in het raam van de publiek-private samenwerking*, Brugges Die Keure, 655. Compare: EBRD, *Concession assessment project*, Report, august 2005, '&p.

[xv] See also the travaux preparatoires for the UNCITRAL, Model Legislative Provisions on Privately Financed Projects, United Nations, New York, 2004.

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[xvii] Uncitral, (2001). *Legislative Guide in Privately Financed Infrastructure Projects*, United Nations, New York. 65-67.

[xviii] Art. 222, *"Texto Refundido de los contratos de las administraciones publicas en general"* and section 4 A Republic Act nr. 7718.

[xix] *See for example the Russian Law on Concession Agreements* (21 juli 2005) nr. 115 and *the Greek PPP law*, 3389/2005 (22 september 2005).