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THE ENFORCEMENT OF THE DIRECTIVE 2014/23/EU IN BELGIUM: GENERAL REMARKS

SUMMARY: 1. The concessions under discussion. – 2. The method of transposition and the objectives pursued Belgian law. 3. The application scope of Belgian law. – 3.1. The works concessions. – 3.2. The service concessions. – 4. The principles relating to the awarding procedure in Belgian law. – 4.1. The fixed price principle. – 4.2. The principle of the service done and accepted. – 5. Two light regimes. – 5.1. A light regime for the social services and other specific services. – 5.2 A light regime for works concessions, which do not exceed the amount laid down by Royal Decree. – 6. The Belgian possibility to conduct a prior consultation. – 7. A set of Belgian specifics in the field of procedural guarantees. – 8. The conclusion of the concession contract in Belgian law. – 9. The execution of the concession contracts in Belgian law. – 10. The concession contract awarding litigation in Belgian law.

On the whole, we can assert that Belgium loves Europe. But when it comes to transposing a directive, things change a little. Belgium is always late – ... or, at least, almost always –.

Unfortunately, we must confess that it is once again the case with the directive 2014/23 of the European Parliament and of the Council adopted on the 26th of February 2014 relating to the award of concession contracts¹.

Two months later on European demand, the Belgian law, which transposes the directive, was sanctioned – to be precise: the 17th of June 2016² – and it was published in the *Belgian Official Journal* – the *Moniteur belge* – in the weeks that followed³. Up till that point, it is not too grave. But – and this is more problematic – the new Belgian regulation only entered into force on the 30th of June 2017, namely fourteen months later⁴.

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 «on the award of concession contracts», *O.J. L 94* of 28 March 2014.

² Law of 17 June 2016 «relative aux contrats de concession».

³ *Moniteur belge* of 14 July 2016.

⁴ See art. 77 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession», *Moniteur belge* of 29 June 2017.

1. The concessions under discussion

We must start by specifying that the Belgian law is applicable to the works concessions and to the service concessions⁵.

In this respect, the law of 17 June 2016 endorses the European definition of the service concession and of the works concession.

In article 2, 7°, a), the aforementioned law defines the works concession as:

«[...] a contract concluded in writing and for pecuniary interest by which one or several contracting authorities entrust work performance to one or several economic operators, the consideration consisting either solely in the right to exploit the work that is the subject of the contract, or in that right together with payment»⁶.

For its part, letter b) of the same provision stipulates that the service concession is:

«[...] a contract concluded in writing and for pecuniary interest by which one or several contracting authorities entrust the provision and the management of services other than work performance to one or several economic operators, the consideration consisting either solely in the right to exploit the service which is the subject of the contract, or in that right together with payment»⁷.

The Belgian law is not applicable to the domain concessions, which have also been excluded by the concessions directive⁸.

In Belgian administrative law, the doctrine generally defines the domain concession as:

«[...] un contrat administratif par lequel l'autorité administrative concédante

⁵ Art. 3, § 1, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

⁶ Free translation from French.

⁷ Free translation from French.

⁸ Recital 15 of the preamble of the directive 2014/23/EU makes it possible to consider the possibility of exclusion, as it stipulates that: «certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive».

the enforcement of the directive 2014/23/eu in belgium

permet à un usager déterminé, soit d'occuper temporairement une parcelle du domaine public de manière exclusive, soit d'utiliser une parcelle du domaine public à des fins auxquelles il n'est pas immédiatement destiné, de manière durable, mais de façon précaire et révocable, et, en principe, moyennant le paiement d'une redevance»⁹.

The Belgian legislator confirms that the domain concession as defined above does not fall within the scope of the law of 17 June 2016. However, a contract will fall within the scope of the law of 17 June 2016 in case the domain concession at stake is an inseparable and accessory part of a contract that consists of the contracting authority entrusting the implementation of the works or services meeting the requirements laid down by said authority and of which it can require or impose execution, in exchange for the right to exploit the work or services.

Concretely, this means that, with regard to the domain concessions, there are still, in Belgium, no specific written rules for governing these concessions. There are only general rules or principles such as equality in the procedure to award the concession or transparency and, so, motivation of the decision awarding the concession to a tenderer rather than to another¹⁰.

Domain concessions are not the only concessions excluded by Belgian law.

It is also appropriate to mention that, on the basis of the directive, the concessions awarded in the water sector¹¹, in the lottery sector¹² and, as far as a specific regulation has been set up, the transport concessions¹³, escape the application scope of the Belgian law on concessions.

2. The method of transposition and the objectives pursued by Belgian law

The elaboration of the Belgian law on the concessions has been guided by three main objectives: ensuring a faithful transposition; not going further than what has been strictly required by the directive; and, as far as possible, ensuring the simplification of the legal regime¹⁴.

⁹ D. Renders, *Droit administratif général*, 2nd ed., Brussels, Bruylant, 2017, 412, n° 742.

¹⁰ D. Renders, *Droit administratif général*, 2nd ed., Brussels, Bruylant, 2017, 412, n° 742.

¹¹ Art. 3, § 1, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

¹² Art. 4, 3°, of the law of 17 June 2016 «relative aux contrats de concession».

¹³ Art. 5, § 1, of the law of 17 June 2016 «relative aux contrats de concession».

¹⁴ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 6.

In this regard, we can observe that:

- A single legal system is set up. The rules and principles, which form part of this legal system, form a consistent whole, a sort of *corpus*, applicable to all the concessions falling within the scope of the law, both in the classical sectors – including defence and security domains –, and in special sectors whose the activities – especially in matters of energy, transport and postal services – are listed in an annex to the Belgian Law¹⁵.

- Each time the directive gives room for manoeuvre to the Member States, Belgium decides to bring the concessions legal system as close to the public procurement legal system required by the directive 2014/24¹⁶ and the directive 2014/25¹⁷, adopted at the same date as the concessions directive.

- Not only does Belgium set up the rules related to the award of concession contracts, Belgium also lays down several basic rules in matters of contract execution, which were completed by a set of regulatory rules¹⁸.

- Lastly, the provisions related to motivation, information and appeal enacted by the concessions directive are not transposed by the law which has been mentioned till now. There are transposed by another, more recent, law¹⁹. The reason is that all of the provisions regarding motivation, information and appeal in matters of public procurement contracts are located in a different law, amended in order to complete the set at issue with specific demands connected to concessions²⁰.

To summarise, we so can count three Belgian laws implementing the European directives on both public procurement and concession contracts: one law regarding public procurements; a second law related to concessions whose objective is the most simple it can be and – in that perspective –

¹⁵ It concerns the activities referred to in annex II of the law of 17 June 2016 «relative aux contrats de concession».

¹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 «on public procurement and repealing Directive 2004/18/EC», *O.J. L 94* of 28 march 2014.

¹⁷ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 «on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC», *O.J. L 94* of 28 march 2014.

¹⁸ See the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

¹⁹ Law of 16 February 2017 «modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services», *Moniteur belge* of 17 March 2017.

²⁰ Law of 17 June 2013 «relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services», *Moniteur belge* of 21 June 2013.

which looks like the law on public procurements; and a third law designed in order to lay down all the arrangements about motivation, information and appeal in matters of both public procurements and concessions.

3. The application scope of Belgian law

Turning now to the crux of the issue, we can say that the Belgian law on the works and service concessions is, broadly speaking, a copy paste of the European directive on concessions.

Without prejudice to the fact that we now know that works concessions and service concessions are only concerned by the law we have to describe, apart from some exceptions, here are a few precisions about the application scope of this law in matters of works concession (A), then in matters of service concessions (B).

3.1. The works concessions

The Belgian law is applicable to the awarding as well as to the execution of the works concession whatever its estimated value, namely the estimated turnover of the concessionaire during the contract period evaluated at the time of contract conclusion²¹. It means that the European threshold – established to 5.548.000 euros²² – will only be useful in order to determine whether the works concession at stake has to be subject to a European publicity²³.

The preparatory documents leading to the adoption of the Belgian law highlight that the threshold of 5.548.000 euros reflects, on the basis of recital 23 of the concessions directive²⁴, the «clear cross-border interest» of the

²¹ Art. 35, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

²² Art. 4, sub. 1, of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

²³ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54-1708/001, 23.

²⁴ Recital 23 of the directive 2014/23/EU provides that «This Directive should apply only to concession contracts whose value is equal to or greater than a certain threshold, which should reflect the clear cross-border interest of concessions to economic operators located in Member States other than that of the contracting authority or contracting entity. Consequently, the method of calculating the estimated value of a concession needs to be set out, and should be identical for works and services concessions, as both contracts often cover elements of works and services. The calculation should refer to the total turnover of the concessionaire in consideration of the works and services being the object of the concession,

concessions for the economic operator located in the other Member States than the one in which the contracting authority is settled²⁵.

In other words, it is not excluded that certain concessions, whose estimated value is lower than 5.548.000 euros, can present a «cross-border interest». In such cases, these concessions should be preceded by a publicity at the European level and be awarded in compliance with the general principles established by the Treaty, namely: free movement of goods; freedom of establishment; freedom to provide services; but also the principles deriving therefrom such as equality of treatment, non-discrimination, mutual recognition, transparency and proportionality²⁶.

3.2. *The service concessions*

In terms of service concessions, the Belgian law is exclusively applicable to the concessions whose value is equal or greater than the threshold of 5.548.000 euros²⁷.

We immediately add that what we explained in the preceding point related to the so-called «clear cross-border interest» in matters of works concessions equally applies in matters of service concessions²⁸. As a consequence, it is not excluded that a concession whose estimated value would not pass the European threshold can have a «cross-border interest» and has to be awarded in compliance with the rules and principles of the Union primary law, and, so, notably by being subjected to a public tendering procedure at the European level²⁹.

Furthermore, it is necessary to emphasise that, if the service concession whose value is lower than the European threshold meets the Belgian administrative law definition of the public service concession, it will have to be awarded in compliance with the rules and principles applicable in Belgian administrative law anyway, such as equality of treatment and the obligation of providing a formal motivation to each unilateral administrative act³⁰.

as estimated by the contracting authority or the contracting entity, excluding VAT, over the duration of the contract».

²⁵ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 23.

²⁶ *Ibidem*, 24.

²⁷ Art. 3, § 1, sub. 2, of the law of 17 June 2016 «relative aux contrats de concession».

²⁸ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 23.

²⁹ *Ibidem*, 24.

³⁰ *Ibidem*, 24.

In this regard, it needs to be specified that, by «public service concession», Belgian administrative law means:

«[...] le contrat administratif par lequel une autorité concédante – l'autorité administrative – charge un particulier, personne physique ou personne morale, ou une société d'économie mixte ou même une autre personne publique, de gérer un service public à ses frais, risques et périls, selon les modalités fixées par l'autorité concédante, et moyennant le paiement d'une rémunération perçue par le concessionnaire, laquelle rémunération est à charge des usagers du service»³¹.

This definition does not strictly coincide with the European definition provided in article 5, 1), a), of the directive 2014/23/EU.

As a matter of fact, if Belgian and European definitions display certain identical characteristics, such as the transfer of operating risks, they mainly vary by their object. In European Union law, concessions can concern any kind of services, with the exception of the exclusions designated by the directive 2014/23/EU. In Belgian administrative law, in contrast, public service concessions only concern the contracts whose object corresponds to a public service³².

4. The principles relating to the awarding procedure in Belgian law

With regard to the awarding procedure itself, Belgian law incorporates all the principles enshrined in the concessions directive. In other words, it is about: equality of treatment; non-discrimination; conflicts of interest prohibition; and prohibition of acts distorting competition³³.

Two particularities have to be pointed out since they do not form part of the directive but do form part of the Belgian law: the principle of the fixed price on the one hand (A) and the principle of the service done and accepted on the other (B).

4.1. The fixed price principle

As concerns fixed price, the Belgian law incorporates this principle,

³¹ D. Renders, *Droit administratif général*, 2nd ed., Brussels, Bruylant, 2017, 421, n° 754.

³² *Documents parlementaires*, Chambre des représentants, ordinary session 2015-2016, n° 54-1708/001, 13.

³³ See art. 24 to 26 of the law of 17 June 2016 «relative aux contrats de concession».

which is applicable to the public procurement contracts, but by adapting it to concession field³⁴.

The principle of fixed price is justified by the fact that the concession feature – in comparison with the public procurement – lies in the transfer of operating risks at the expense of the concessionaire³⁵.

The flexibility, which has the necessity to be recognised to the concession contracts – quite complex by definition – led Belgium to permit some exceptions as far as these exceptions are duly motivated in the concession contract documents³⁶.

It is important to underline that the fixed price principle is only established as regards the price paid by the contracting authority³⁷. On the contrary, the contracting parties are completely free to determine, in the contract provisions, the fixed – or unfixed – nature of the potential fee contractually charged to the concessionaire for the benefit of the contracting authority³⁸.

It must be added that the principle under examination shall not preclude to a downward or to an upward price revision,³⁹ the detailed rules of which being laid down in article 63 of the Royal Decree of 25 June 2017⁴⁰.

4.2. The principle of the service done and accepted

With regard to the principle of the service done and accepted, the Belgian legislation adopts the same rule as the rule established in the framework of public procurement⁴¹.

³⁴ Art. 28 of the law of 17 June 2016 «relative aux contrats de concession».

³⁵ *Documents parlementaires*, Chambre des représentants, ordinary session 2015-2016, n° 54-1708/001, 52.

³⁶ Art. 28, § 1, of the law of 17 June 2016 «relative aux contrats de concession».

³⁷ *Documents parlementaires*, Chambre des représentants, ordinary session 2015-2016, n° 54-1708/001, 52.

³⁸ *Ibidem*.

³⁹ See, in this respect, the cases listed in article 28, §§ 2 et 3, of the law of 17 June 2016 «relative aux contrats de concession».

⁴⁰ The King has not been able to enforce the case provided for by article 28, § 2, of the law of 17 June 2016. The Report to the King preceding the adoption of the “Royal Decree” of 25 June 2017 rightly explains that the case referred to in paragraph 3 of the above provision – concerning the concession revision in case of upheaval of the initial contractual balance – is not fit for implementation since awarding a concession contract always implies the transfer of operational risks inherent in operation of works or services onto the economic operators.

⁴¹ Art. 29 of the law of 17 June 2016 «relative aux contrats de concession».

The principle of the service done and accepted basically means that the contracting authority is liable to pay its counterpart only when the service has been carried out and accepted⁴².

Consequently, prepayments are not allowed⁴³. However, a Belgian Royal Decree is required to list the exemptions to this rule, quite broadly, since concessions are generally complex contracts, which demands flexibility⁴⁴.

In this perspective, the Royal Decree of 25 June 2017 confirms the principle that, when a concession contract includes payment, the latter must be made in a single sum after execution of the contract tasks or by down payments. However, according to the above-mentioned Royal Decree, it is permissible to proceed by paying in alternative ways, on the condition it is stipulated in the concession contract documents⁴⁵.

As required by the law of 17 June 2016, the Royal Decree of 25 June 2017 sets out the cases in which prepayments can be made to the concessionaire⁴⁶.

5. Two light regimes

The concession awarding procedure that we can find in Belgian law is very similar to the procedure that every European citizen can read in the directive.

Having said that, it should be highlighted that Belgium has specified several aspects of this procedure and, notably, developed two light regimes: a light regime for the social services and other specific services (A) and a light regime for works concessions which do not exceed the amount laid down by the Royal Decree (B).

5.1. A light regime for the social services and other specific services

The directive stipulates that a legal light-regime should be put in place

⁴² D. Renders, *Droit administratif général*, 2nd ed., Brussels, Bruylant, 2017, 446, n° 792.

⁴³ Art. 29, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

⁴⁴ Art. 29, sub. 2, of the law of 17 June 2016 «relative aux contrats de concession».

⁴⁵ Art. 57, § 1, of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁴⁶ Art. 57, § 2, of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

for the social services as well as for a range of services listed in one of the annexes to the directive⁴⁷.

For example, this is the case for hotels and restaurant services, compulsory social security services, postal services, certain legal services, services related to prison administration, certain public security services and emergency services or even investigation and security services.

In this particular regime, there is – at least in principle – no obligation to publish a concession notice⁴⁸.

However, the contracting authority is obliged to publish a prior information notice, which serves to indicate the intentions of the contracting authority⁴⁹.

The contracting authority is also liable to publish an award notice⁵⁰ and, prior to that, as far as possible, to consult several operators⁵¹. Failing that, the authority should motivate the reason why it didn't do it⁵².

In this particular regime, the contracting authority also has to check that no tenderer is any cause of exclusion⁵³.

In principle, since the contracting authority is entitled to consult the operators of its choice – or even one single operator –, it is via the identification of these operators itself that the qualitative selection is based⁵⁴.

However, it is not prohibited to the contracting authority to provide for qualitative selection criteria in its invitation to submit, except for the circumstances in which only one operator has been consulted⁵⁵.

Still in the framework of this particular regime, the awarding procedure is freely organised by the authority, but definitely subject to the observance of the provisions enacting the main principles, namely equality of treatment, non-discriminatory attitude, proportionality and transparency, non-distor-

⁴⁷ Art. 19 of the directive 2014/23/EU and its annex IV. See also the list for social services and other specific services set out in Annex V of the law of 17 June 2016 «relative aux contrats de concession».

⁴⁸ Art. 34, § 1, of the law of 17 June 2016 «relative aux contrats de concession».

⁴⁹ Art. 12 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁵⁰ Art. 13 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁵¹ Art. 34, § 2, of the law of 17 June 2016 «relative aux contrats de concession».

⁵² *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 58–59.

⁵³ Art. 34, § 2, 2°, of the law of 17 June 2016 «relative aux contrats de concession».

⁵⁴ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 59.

⁵⁵ *Ibidem*.

tion of competition, interest conflict prohibition, confidentiality, fixed price and service done and accepted⁵⁶.

The contracting authority is required to award the concession contract on basis of the award criteria it set out in the concession documents⁵⁷.

The authority is also allowed to conduct negotiations in compliance with the principle of equal treatment⁵⁸. However, these negotiations cannot have the effect of amending the concession object, but also cannot have the effect of amending the award criteria⁵⁹.

In exceptional circumstances, the contracting authority can, during the negotiation procedure, modify the potential minimum requirements it settled as far as it respects the equality of treatment between all of the tenderers and the afferent transparency⁶⁰.

In that respect, the authority is obliged to communicate the minimum requirements amended towards each tenderer and to invite them to bid on this basis, giving them a reasonable period to do so⁶¹.

5.2. A light regime for works concessions, which do not exceed the amount laid down by Royal Decree

A facilitation regime is also set up for the works concessions, which do not exceed the amount laid down by Royal Decree⁶², namely 1.750.000 euros⁶³.

In further details, the specific procedure corresponds to the procedure we just described for the social and other specific services⁶⁴. However, we notice, here, that the contracting authority is required to publish a concession awarding notice at the Belgian level, in accordance with the provisions specifically mentioned in the Belgian law⁶⁵.

One should not confuse the case under examination with the works concessions whose estimated value is over 1.750.000 euros and does not

⁵⁶ Art. 34, § 2, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

⁵⁷ *Ibidem*.

⁵⁸ Art. 34, § 2, sub. 3, of the law of 17 June 2016 «relative aux contrats de concession».

⁵⁹ *Ibidem*.

⁶⁰ *Ibidem*.

⁶¹ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 60.

⁶² Art. 43, § 1, 1°, of the law of 17 June 2016 «relative aux contrats de concession».

⁶³ Art. 5 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁶⁴ See *supra*, n° 12 à 18.

⁶⁵ Art. 43, § 2, *in fine*, of the law of 17 June 2016 «relative aux contrats de concession».

exceed 5.548.000 euros, namely the threshold from which a European publicity is required. The latter do not benefit from the light regime under analysis. Consequently, they are subject to a concession notice published in an annex to the *Belgian Official Journal* – the *Bulletin des Adjudications* –, without prejudice to the contracting authority's capacity to publish this notice in the *Official Journal of the European Union*, too⁶⁶.

6. The Belgian possibility to conduct a prior consultation

Putting aside the two light-regimes we just described in matters of social services and works concessions not exceeding the amount laid down by Royal Decree, one thing, which is not provided for by the directive, but that we can find in the Belgian law, lies in the possibility, on the part of the authority, to conduct a prior consultation of the market in keeping with certain conditions⁶⁷.

Belgium considers the fact that the market prior consultation is not governed by the directive as not meaning that this prior consultation would be forbidden.

According to the preparatory documents leading to the adoption of the Belgian law, this kind of consultation must even be strongly encouraged due to the complex character, which often follows the pattern of the concession and, above all, regarding because of the difficult estimation of its duration and of its value⁶⁸.

These prior consultations should equally allow the authority to better define the awarding procedure and to keep abreast of all kinds of innovations in order to establish the technical and functional specifications, but equally the contractual and financial clauses in order to conclude a concession contract in conformity with its needs and, at the same time, which would be profitable on the part of the concessionaire, under penalty of not obtaining any bids⁶⁹.

It goes without saying that this prior consultation must precede the launch of the awarding procedure and cannot lead to a prior negotiation with certain economic operators.

⁶⁶ Art. 7, § 2, of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁶⁷ Art. 39 of the law of 17 June 2016 «relative aux contrats de concession».

⁶⁸ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 68.

⁶⁹ *Ibidem*.

7. A set of Belgian specifics in the field of procedural guarantees

A set of specifics is provided for by the Belgian law in the field of procedural guarantees.

It is stipulated that, if the contracting authority observes that the tenderer's bid to whom the authority envisages to award the concession contains concrete violations of criminal provisions relating to social law, labour law or environmental law, the authority is obliged not to award the concession to this tenderer⁷⁰.

This clause must not be confused with the related facultative exclusion clause: it is a complementary clause in order to fight against the social dumping⁷¹.

Furthermore, Belgium recalls the necessity – mentioned in the concessions directive – of mentioning the selection conditions in the concession notice. It is even more important when it is about a procedure divided into two steps, in which, on the basis of the concession notice, candidates are submitted for the purpose of a qualitative selection and the further invitation to bid⁷².

Under the procedural guarantees granted by Belgian law, it is worth emphasising:

The existence of a «document de preuve provisoire» (DPP)⁷³. The genesis of this specific document is that the directive 2014/23/EU leaves the Member States entirely free to set out the evidence rules and the verification procedure concerning both exclusion grounds and selection conditions.

Article 48, § 4, of the law of 17 June 2016 empowers the Belgian King to enact these aspects, while at the same time requiring the contracting authorities, with regard to selection conditions, to impose a provisional mode of proof. On the basis of this legislative power, the Royal Decree of 25 June 2017 provides, in its annex 6, a standard form intended for economic operators concerning exclusion grounds designated in articles 50, 51 et 52 of the law of 17 June 2016⁷⁴, along with selection conditions and criteria provided for in the concession contract documents.

– Article 16 of the Royal Decree of 25 June 2017 lays down the minimal content of the concession contract documents, which have to include in

⁷⁰ Art. 46, § 1, sub. 2, of the law of 17 June 2016 «relative aux contrats de concession».

⁷¹ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 74.

⁷² *Ibidem*, 76.

⁷³ See, in this respect, art 2, 13°, 34 and 39 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁷⁴ The grounds for exclusion are set out by art. 31 to 33 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

particular: the concession object; the identity of the contracting authority; the contract duration; the minimal requirements that bids are required to meet as well as the minimal requirements related to other regularity of bids conditions; the description of the awarding procedure; the awarding criteria and the detailed rules related to them; the execution conditions of the concession, such as general obligations – notably, and above all, the obligations in matters of environmental, social and labour laws –, but also specific obligations for each different concession, operating procedure for executing works or services, performance bonds to be provided by the concessionaire – for example, the surety bond –, provisions concerning breach of contract and their sanctions; ...

– Article 46, § 1^{er}, 1^o, of the law of 17 June 2016 goes beyond what was required by the directive 2014/23/EU, since it provides that concessions can only be awarded to a tenderer whose bid is lawful. For its part, the directive only requires to award a concession to a tenderer who has submitted a bid in compliance with the minimal requirements stipulated in the concession contract documents.

Article 30 of the Royal Decree of 25 June 2017 lays down a system to ensure the tendering procedure regularity, which is almost similar to the system applicable in matters of public procurement contracts.

8. The conclusion of the concession contract in Belgian law

As regards the conclusion of the concession contract in itself, we also can mention different specifics that we do not find in the European directive provisions⁷⁵.

The contracting authority has to determine, in the concession documents, the procedure for the concession conclusion⁷⁶. For instance, the contracting authority may stipulate the contract is concluded by the notification of the successful tenderer bid's approval, or by the signature or even by the entry into force of the contract.

Belgian law also says that completing an awarding concession contract procedure does not imply the obligation of either awarding or concluding the contract. The contracting authority may either renounce to award or to conclude the contract at issue, or even may re-launch the procedure, if need be in another way⁷⁷.

⁷⁵ Art. 56 of the law of 17 June 2016 «relative aux contrats de concession».

⁷⁶ Art. 56, sub. 1, of the law of 17 June 2016 «relative aux contrats de concession».

⁷⁷ Art. 56, sub. 2, of the law of 17 June 2016 «relative aux contrats de concession».

In case the concession is divided into different lots, the contracting authority has the right to only award certain lots or, if any, to decide that the other lots will be subject to one or several concession contracts, possibly in another way⁷⁸.

9. The execution of the concession contracts in Belgian law

The rules in matters of execution of the concession contracts are laid down in a royal decree on the basis of a legislative provision⁷⁹.

The preparatory documents leading to the adoption of the Belgian concessions law express the reason why the Belgian legislation has decided to proceed in such a way. We can read:

«La présente disposition prévoit une délégation large au Roi. Cette façon de procéder diffère légèrement de celle adoptée pour les chapitres précédents, où il a été opté pour une intégration de la plupart des dispositions de la directive 2014/23/UE dans le cadre légal et de donner uniquement au Roi la possibilité de fixer les modalités complémentaires.

Toutefois, pour l'exécution des concessions, le législateur européen n'a repris que quelques dispositions relatives à la sous-traitance, la modification et la résiliation. Ces dispositions sont certes importantes et visent à faire écho à la jurisprudence de la Cour de Justice en matière de modifications substantielles et de principe de légalité des marchés.

Ces dispositions impliquent des modifications importantes aux règles générales d'exécution des marchés publics et des concessions de travaux publics reprises dans l'arrêté royal du 14 janvier 2013, en particulier celles relatives aux modifications et aux incidents d'exécution. L'exécution des concessions fera dès lors l'objet d'un arrêté royal spécifique qui reprendra en les adaptant les dispositions applicables de l'arrêté royal du 14 janvier 2013»⁸⁰.

As a consequence, the execution concession contract rules are subject to a Royal Decree, which has already been mentioned – the Royal Decree of 25 June 2017 –.

More specifically, the concession contract execution rules are provided for by articles 45 to 74 of the aforementioned Royal Decree.

It can be highlighted that the law of 17 June 2016 not only empowers the Belgian King to set out the rules related to concession contract execu-

⁷⁸ *Ibidem*.

⁷⁹ Art. 57 of the law of 17 June 2016 «relative aux contrats de concession».

⁸⁰ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54-1708/001, 94.

tion. Article 58 of this Decree contains various specifics on the concession contracts execution conditions. This provision stipulates that the contracting authorities have to specify, in the concession documents, the execution and exploitation conditions of the works and services, which form the contract objects. However, the travaux préparatoires leading to the adoption of the law suggest, in this respect, to refer to the provisions contained in the Royal Decree of 25 June 2017, too⁸¹.

As referred to in article 57 of the law of 17 June 2016, the Royal Decree of 25 June 2017 transposes the provisions of the directive 2014/23/EU concerning subcontracting⁸², concession contracts amendments in the course of performance⁸³ and contract termination⁸⁴.

With regard to subcontracting, it needs to be emphasised that the Royal Decree establishes the general principle whereby the fact that the concessionaire subcontracts, in whole or in part, the concession contract execution does not abrogate its responsibility and contractual commitments vis-à-vis the contracting authority⁸⁵. This principle already existed under the old legislation but it is reaffirmed since subcontracting has now become more regulated.

The Report to the King preceding the adoption of the Royal Decree of 25 June 2017 provides, in this respect, an example in which the contracting authority is allowed – or even, in some cases, required – to assess whether an exclusion ground applies to the subcontractor.

However, these rights and obligations of the contracting authority do not in any way limit the concessionaire responsibility.

As is known, in accordance with article 43 of the directive 2014/23/EU, the cases in which concessions can be modified without launching a new awarding procedure fall into two categories: those provided for by the concession contract documents – namely sunset clauses – and those directly provided for by the legislation. The Royal Decree of 25 June 2017, of course, follows this logic.

⁸¹ *Documents parlementaires*, Chambre des représentants, ordinary session 2015–2016, n° 54–1708/001, 95.

⁸² Art. 43 and 49 to 56 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸³ Art. 61 to 68 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸⁴ Art. 73 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸⁵ Art. 49 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

It should be noted that the same Royal Decree governs both the amendments unilaterally imposed by a contracting authority and those intended by the contracting parties. This feature finds its rationale in Belgian administrative law, which recognises the principle of the administrative contracts alienability that allows the administrative authority to modify an administrative contract unilaterally, for the purpose of the general interest but in exchange for fair compensation, if needed.

Let us further specify that the procedure for doing so is not laid down in the provisions of the Royal Decree of 25 June 2017. It results from the Report to the King preceding the adoption of the latter that the concession contract documents can lay down this procedure. Failing that, the modification should be made by means of an endorsement signed by the contracting parties. It also could be made through an exchange of correspondence, agreed upon and signed by the parties.

With regard to concession contract termination, beyond the three cases set out in article 44 of the directive 2014/23/EU, the Royal Decree of 25 June 2017 stipulates that a contracting authority can terminate a concession where a ground for exclusion applies to the concessionaire, without prejudice to regularisation or eventual corrective actions.

To these cases must be added a specific regime referred to in article 71 of the Royal Decree of 25 June 2017. In substance, it is about empowering the contracting authority – among other *ex officio* measures – to terminate the concession unilaterally in the case of serious contractual failure on the part of the concessionaire. The implementation of this measure requires the contracting authority to observe a strict procedure.

The Royal Decree of 25 June 2017 stipulates, furthermore, other aspects of the concession contract execution, which are not covered by the directive 2014/23/EU. For example:

- Measures or securities, which guarantee the proper performance of the concessionaire obligations⁸⁶;
- Detailed rules and deadlines⁸⁷, along with the late payment⁸⁸ of the potential concession price;
- 10-year warranty in matters of works concessions⁸⁹;

⁸⁶ Art. 48 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸⁷ Art. 57 and 58 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸⁸ Art. 59 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles générales d'exécution des contrats de concession».

⁸⁹ Art. 69 of the Royal Decree of 25 June 2017 «relatif à la passation et aux règles

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Another Belgian feature should be noted, which is referred to in article 70, § 1, of the Royal Decree of 25 June 2017. This provision empowers the contracting authority to make applicable to their concessions, in whole or in part, the regime designed for public work contracts by the Royal Decree of 14 January 2013 «*établissant les règles générales d'exécution des marchés publics*»⁹⁰.

10. The concession contract awarding litigation in Belgian law

The concession contract awarding litigation has been transposed – as we mentioned – in other laws whose purpose is to extend the legal regime applicable to the public procurement contract awarding litigation to the concession one⁹¹.

The best proof of this is that, in order to incorporate concessions, the title of the law of 17 June 2013 has been changed as follows: «*Loi relative à la motivation, à l'information et aux voies de recours en matière de marchés publics, de certains marchés de travaux, de fournitures et de services et de concessions*»⁹².

Consequently, since 30 June 2017, the concepts of waiting period, suspension appeals, annulment appeals, declaration of contract ineffectiveness, substitutive sanction and so on... , are applicable in matters of Belgian concession contracts⁹³.

In addition to the applicable appeal procedures, and just as in matters of public procurement contracts, each concession award now has to be subject to a motivated decision and also has to be communicated to the relevant participants, applicants and tenderers, under specific terms.

As mentioned above, Belgium already had an important litigation sys-

générales d'exécution des contrats de concession».

⁹⁰ *Moniteur belge* of 14 February 2013.

⁹¹ See *supra*, n° 4.

⁹² Art. 2 of the law of 16 February 2017 «*modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*».

⁹³ See art. 48 of the Royal Decree of 22 June 2017 «*modifiant l'arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marchés publics et des concessions de travaux publics et fixant la date d'entrée en vigueur de la loi du 16 février 2017 modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*», *Moniteur belge* of 27 June 2017.

tem in matters of public procurement contracts under the law of 17 June 2013. The key result of the law of 16 February 2017 is to make this system, in its entirety, applicable to the concession contracts, which fall within the scope of the law of 17 June 2016 and whose estimated value exceeds the threshold set for the European publicity.⁹⁴ In doing that, the Belgian legislator conforms to articles 46 and 47 of the directive 2014/23/EU.

Furthermore, a facilitation litigation regime – similar to the one applicable in matters of public procurement contracts – is laid down for concessions whose estimated value does not exceed the threshold fixed for the European publicity and falling within the scope of the law of 17 June 2016⁹⁵.

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In conclusion, the overview we just provided about the transposition of the directive 2014/23/EU in Belgian law leads us to formulate various observations.

First of all, Belgium ensures a faithful transposition of the directive. However, we can observe certain specificities proper to Belgian law where the directive leaves room for manoeuvre to the Member States of the European Union.

This is also true as concerns concessions below the thresholds set for the European publicity, since the Belgian legislator provides a facilitation range of rules applicable in these cases, except for service concessions⁹⁶.

Furthermore, we can highlight the Belgian legislator's willingness to bring the concession contract legal regime as closely as possible to the one applicable in the public procurement contracts field.

However, the rules laid down in this field are not purely and simply duplicated. The Royal Decree of 25 June 2017 acknowledges that a certain degree of flexibility is necessary for the awarding and the execution of con-

⁹⁴ Art. 8, 2°, of the law of 16 February 2017 «modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services».

⁹⁵ Art. 36, 2°, of the law of 16 February 2017 «modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services».

⁹⁶ However, the award of service concessions whose value is below the threshold of 5.548.000 € shall be concluded in compliance with rules and principles applicable in Belgian law, such as equality of treatment principle as well as the obligation of formal motivation of individual administrative acts (Documents parlementaires, Chambre des représentants, ordinary session 2015-2016, n°54-1708/001, 23).

cession contracts, which are, by essence, complex and long term contracts. In the Report to the King preceding the adoption of the Royal Decree of 25 June 2017, we can read in this respect that:

«[...] cette flexibilité doit se marquer tant dans la procédure de passation que dans les règles encadrant l'exécution des concessions pour permettre aux adjudicateurs de concevoir et rédiger des documents de concession adaptés à la complexité, à la nature des concessions et aux spécificités de chaque concession particulière».

Lastly, it is certainly good that concession contracts are now governed by a uniform legal framework.

In Belgian law, this is something new since 30 June 2017.

It is worth repeating that with regard to concessions that do not fall within the scope of the law of 17 June 2016, Belgian administrative law continues to govern the concession contract awarding, without being bound by European law, except for the application of the general principles of Union primary law along with the relevant rules, when the concession at issue is of «cross-border interest».

Abstract

The Authors noted first the delay of Belgium in the transposition of concessions directive 2014/23/EU by the Law of 17 June 2016. They analyse the discipline in the matter of works and services concessions and the principles relating to the purchase procedure. Then they describe the two light schemes for social services and other specific services for works concessions, which do not exceed the established amount. They also analyse the possibility to make preliminary consultations and the rules governing the conclusion of the contract. In conclusion, it is clarified that the concessions not included in the law of 17 June 2016, are governed by Belgian administrative law. This type of concessions are not bound by European law, except for the application of general principles set by the EU, together with the relevant rules, when the concession is of cross-border interest.