

Transposition of the Concession Directive in France

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Authors: [Jacques Bouillon](#), [François-Guilhem Vaissier](#), [Anna Seniuta](#)

France transposed the European directive 2014/23/EU of the European Parliament and of the Council dated 26 February 2014 on the award of concession contracts (the “**Concession Directive**”) through the “*ordonnance n° 2016-65*” dated 29 January 2016 (the “**Ordinance**”) and the “*décret n° 2016-86*” dated 1 February 2016 (the “**Decree**”).

The transposition of the Concession Directive was expected following the earlier transposition of the European directives 2014/24/EU and 2014/25/EU on public procurement dated 26 February 2014 on public procurement (which occurred in France on 23 July 2015).

While preserving certain specificities of French law, the Ordinance and the Decree aim to simplify, clarify and unify the existing legal framework governing the award and implementation of concession contracts in accordance with recent French and European case law.

This new single legal framework applicable to concession contracts will enter into force on 1 April 2016 and replace the legal provisions currently applicable (in particular “*loi n° 93-122*” dated 29 January 1993 and “*ordonnance n° 2009-864*” dated 15 July 2009).

The main characteristics of the Ordinance and the Decree are briefly mentioned below.

Unified Legal Framework

The Ordinance provides for a single definition of the concession contract distinguishing it from a public procurement agreement and encompassing the two existing types of concession agreements in France (i.e. public works concession and public service delegations).

Concession contracts will thus be defined as agreements entered into by one or several grantors assigning to one or several economic entities the performance of works or the management of a service, it being specified that (i) a risk linked to the operation of such works or such service has to be transferred to the economic entity in exchange for the right to operate the said works or service, (ii) a fee in favour of the entity can be added to such operation right and (iii) the risk transfer to the economic entity necessarily implies a real exposure to the market’s fluctuation.

Potential Grantors

In addition to public authorities, private entities (entities specially created to satisfy a non-commercial public interest or formed by several public entities in order to jointly perform certain activities and public undertakings (*entreprises publiques*) acting as network operators) will be allowed to grant concession contracts.

Award Procedure

The Ordinance and Directive regulate the bidding and award procedures applicable to concessions of a value greater than or equal to 5,225,000.00 Euros.

The new legal framework will however remain flexible with the aim to ensure effective and non-discriminatory access for all potential bidders (including small and medium-sized companies).

As regards the content of the concession contracts, few provisions will be mandatorily required, allowing for a large degree of freedom in agreeing the concession contract.

Excluded Sectors

The Ordinance provides that the new legal framework will not apply to certain specific sectors (defense, legal advice, financing) and to certain entities (e.g. in-house entities or affiliated companies).

As such, the Ordinance restrictively enumerates the excluded cases which generally appear to be a reflection of the European case law and of the previous legal framework.

Duration and Amendments

The duration of a concession contract which is more than five years will be determined in light of the period needed to amortize the investments required.

In addition, the Decree clarifies the legal framework applicable to amendments by stating six alternative cases allowing a valid modification of the concession contract.

Indemnification in case of Cancellation or Termination by a Judge

The Ordinance clarifies the quantum of the financial indemnification applicable in case of cancellation or termination of a concession contract by a judge following a third party challenge.

As a consequence, the concessionaire may request to be indemnified for the expenses incurred under the concession contract which have been useful to the grantor, including financing expenses and costs.

From a project finance perspective, this express reference to the theory of “useful expenses” (*dépenses utiles*) should be reassuring for both sponsors and lenders.

Subcontracting

The Ordinance authorizes the concessionaire to subcontract part of the construction works or part of the services to be performed to third parties.

Moreover, it is expressly stated that economic entities grouping in order to be awarded a concession contract or affiliate companies of such entities are not considered third parties.

The grantor will however have the possibility to require the bidders (i) to comply with a minimal percentage to be subcontracted to small and medium sized companies or to third parties and (ii) to indicate in their offer the percentage of subcontracting retained.

Transparency and Sustainable Development

In order to optimize the cost monitoring, the Ordinance aims at increasing transparency relating to the performance of concession contracts.

As a consequence, the concessionaire will be required to provide an annual report to the grantor and the grantor will have to annually publish essential data pertaining to the concession (i.e. type of investments, tariffs).

In addition, the Ordinance clearly states that sustainable development and social objectives can be emphasized both during the award procedure and the contract negotiation.

White & Case LLP
19, Place Vendôme
75001 Paris
France

T +33 1 55 04 15 15

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