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COMMISSION STAFF WORKING DOCUMENT

Accompanying the document

Report from the Commission to the European Parliament and the Council

on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12

{COM(2023) 460 final}

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1. INTRODUCTION

A substantial part of public capital in the EU is allocated through public procurement. When public authorities need to mobilise private capital and know-how to complement scarce public resources, concessions are a very attractive way of carrying out projects of public interest without increasing public debt. By encouraging partnerships between the public sector and mostly private companies in key strategic sectors, concession contracts therefore underpin an important share of the economic activity in the EU. This is notably the case for the development of infrastructure, such as ports, parking garages, toll roads or the provision of services of general economic interest such as energy, or waste disposal.

Directive 2014/23/EU on the award of concession contracts[1] ("the Concessions Directive") was adopted in 2014 in the context of the Single Market Act I which sets out twelve levers to boost growth and strengthen confidence in the economy. Considering the important share of economic activity concessions could encompass, the Directive was conceived to provide more legal certainty for concessions. Together with Directive 2014/24/EU[2] on public procurement and Directive 2014/25/EU[3] on the procurement by entities in a number of utilities sector, the Concessions Directive was part of the 2014 Public procurement package designed to modernize public procurement in the EU[4].

The objective of the Concessions Directive is therefore to provide more legal certainty and better access to the concessions markets. It aims at guaranteeing transparency, fairness and legal certainty in the award of concessions contract. The Concessions Directive is a principle-based Directive and covers both works and services concessions awarded by contracting authorities and entities for contracts with values above a specific threshold - currently set at EUR 5 382 000.

In line with Article 53 of the Concessions Directive, the European Commission (Commission) should review the functioning of the Directive and report to the European Parliament (Parliament) and the Council by 18 April 2021. The Commission shall also assess the economic effects on the internal market of the exclusions set out in Article 12 taking into account the specific structures of the water sector, and report to Parliament and Council by 18 April 2019. The delayed transposition of the Concessions Directive did not allow until now for the collection of the necessary body of evidence needed for the Commission's Report. Considering the short period of time during which all Member States actually had transposed the Directive, this staff working document, which accompanies the Commission Report, provides only a first, preliminary assessment of the application of the Concessions Directive.

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1 OJ L94,28.03.2014, p.1.

2 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, OJ L94, 28.03.2014, p.65.

3 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, OJ L94, 28.03.2014, p. 243.

4 The potential of a legislative initiative on concessions contracts for creating a supportive EU framework for public-private partnerships was also singled out already in the Commission's 2009 Communication on *Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships*, COM(2009) 615 final of 19.1.2009.

2. METHODOLOGY

The report focuses essentially on the EU Member States and the 2016 to 2021 period[5]. For the sake of comparison with the situation prevailing before the expiry of transposition period - 18 April 2016, Chapter 3 covers the 2012 to 2019 period on the basis of the research made by London Economics Europe and Spark Legal[6] (see below).

The Report is based on a body of evidence coming from multiple sources:

1. Data extracted from the Tenders Electronic Daily database and presented in Chapter 5 to Chapter 7. Data covers exclusively contracts published under the Concessions Directive. This scope is narrower and hence different from the approach chosen in the London Economics Europe and Spark Legal (2021) study. The decision is motivated by certain data processing risks that are inherently associated with the text mining methods used in that study.
2. Information[7] made available by Member States in accordance with Article 45 of the Directive, on most frequent causes of incorrect application of the rules for award of concessions, possible structural or recurring problems, including possible cases of fraud or other illegal behaviour.
3. The Study on the implementation of the Concessions Directive carried out for the Commission by London Economics Europe and Spark Legal (2021). The study assesses the functioning of the Concessions Directive, mapping the existing situation and provides an overview of how the Concessions Directive is being applied. The study covers the period 2012 to end 2019 and the EEA countries. Its results are mainly used in Chapter 3 of this staff working document. In order to address the situation before 2016, the study followed a data mining method, involving a certain level of data processing risks. Some of the findings of the study are thus not directly comparable with the Commission's in-house data analysis (Chapters 5 and 6). More information about the methodological differences is provided in Annex to this staff working document.
4. A survey launched by the Commission services in 2021 to gather information from Member States on the organisation of the water sector. All Member States provided contributions by September 2021. The replies confirm the complexity of the water sector, with very divergent country-specific settings for the provision of drinking water.
5. Positions expressed by stakeholders during an online Stakeholders' Event on the review of the functioning of the Concessions Directive and the assessment of water exclusion organised by the Commission on 15 November 2021. The event provided all relevant stakeholders the possibility to share their experience with the functioning of the Directive and express their opinions on specific aspects, in

[5] Chapter 5.3 Cross-border and Foreign Participation in the EU concessions market focuses on EU Member States.

[6] Study on the implementation of the Concessions Directive – Final Report, carried out for the Commission by London Economics Europe and Spark Legal (2021).

[7] In particular Member States reports of 2018 and 2021 (available https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en) and information available on the websites of relevant national authorities in charge of public procurement and concessions, competition and anti-corruption.

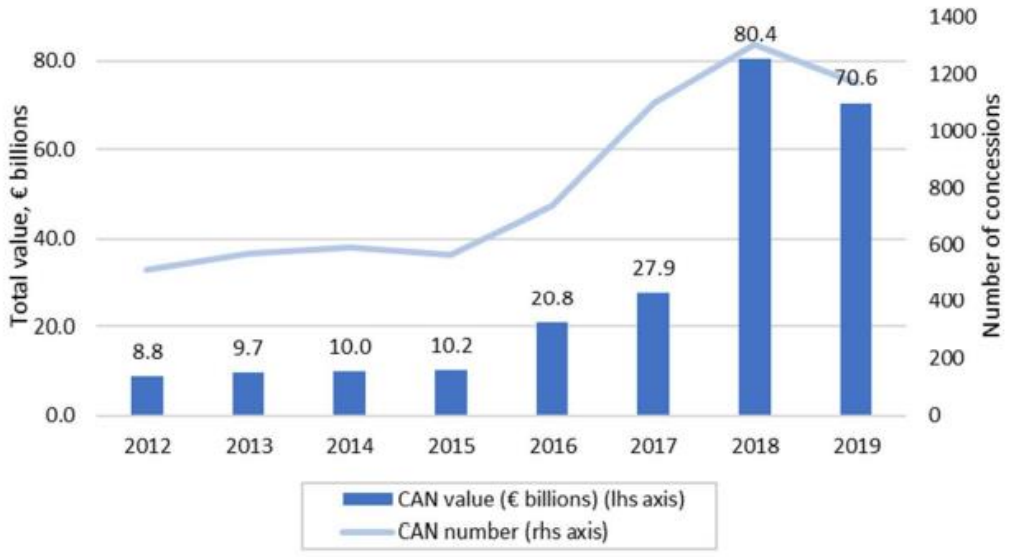
particular the exclusion of the water sector. The event gathered more than 200 participants from different stakeholders' groups: public authorities awarding works or services concessions, companies active on the concessions markets, national authorities and other associations. The level of attendance puts a certain limitation to the conclusion that can be drawn from discussions, however opinions expressed during the event and results of an ad-hoc survey are presented in different sections of this document. The opinions and results of these surveys may not be representative of the entire population of stakeholders, nevertheless they are considered informative for the purposes of this report.

3. OVERVIEW OF THE ECONOMIC SIGNIFICANCE OF THE CONCESSION MARKET

The Commission estimates that the overall value of government procurement in the EU was around EUR 2 163 billion in 2018 or 13.6% of EU GDP[8], out of which around EUR 670 billion[9] was covered by the three public procurement Directives. The overall value of procurement under these three legal acts combined accounted for around 4.2% of EU GDP.

According to London Economics Europe and Spark Legal (2021), the value of concession awarded between 2012 and 2019 is estimated to account for around EUR 238 billion. This period covers the pre- and post-Concessions Directive publications (i.e., before and after 18 April 2016). The data presented below captures contracts identified by concession-specific standard forms and text search for words that can be associated with concessions contracts[10].

Figure 1: Concession award notices by year [number, value in billion EUR]



[8] Public Procurement Indicators 2018, DG GROW, May 17, 2021 (https://ec.europa.eu/docsroom/documents/48156).

[9] Idem.

[10] More information on the methodology applied is available in annex A2 of the London Economics Europe and Spark Legal (2021) study, page 171.

Source: London Economics Europe and Spark Legal (2021), Figure 41.

Taking into account the estimated value of concessions awarded in 2018 (EUR 80.4 billion) and the overall figure of public procurement notices published in Tenders Electronic Daily for the same year (EUR 670 billion), the Commission estimates that concessions represent approximately 12% of the overall public procurement market covered by all public procurement Directives (the Concessions Directive included).

Number of concessions award by country

The yearly average number of concessions for the EEA countries has doubled since April 2016 and continues to increase. The vast majority of concession contract awards occur in France and Italy, which totals 69% of all concessions over the period. Together with Spain and Germany, they represent 84% of all concessions, over the 2012 to 2019 period, but also after 18 April 2016.

Comparing the pre-Concessions Directive and post-Concessions Directive periods ([11]), the largest increases occurred in France, Germany and Spain. Austria, Croatia, Czechia, Finland, Hungary, Malta and Sweden also registered large increases in the relative number of concessions.

A closer examination of the pre-Concessions Directive trends in France, Germany and Spain suggests that the increase observed post-Concessions Directive could not have been predicted by the pre-Concessions Directive evolution. Therefore, these three cases seem to suggest a strong positive impact of the Concessions Directive on the use of concessions. In Italy, on the other hand, the increasing trend is already present in the pre-Concessions Directive period.

Figure *2* below presents the evolution of the number of concessions by year and by country, in terms of concession award notices.

([11]) Pre-Concessions Directive period is the period from 2012 until 18 April 2016 - the expiry of transposition deadline, while post-Concessions Directive period is the period from 18 April 2016 to 2019.

Figure 2: Concessions by country and year (concession award notices) [number]

Country	Total	2012	2013	2014	2015	2016-pre	2016-post	2017	2018	2019	Pre-Directive average	Post-Directive average
Austria	31	1	1	1	2	0	3	7	7	9	1.2	7.0
Belgium	69	13	3	2	9	1	7	7	14	13	6.5	11.1
Bulgaria	11	0	5	0	0	0	0	3	2	1	1.2	1.6
Croatia	17	0	0	0	1	0	1	8	7	0	0.2	4.3
Cyprus	3	0	0	0	0	0	0	0	1	2	0.0	0.8
Czechia	36	2	1	0	1	0	1	7	12	12	0.9	8.6
Denmark	53	3	9	9	10	3	5	5	8	1	7.9	5.1
Estonia	46	4	1	2	3	2	4	10	12	8	2.8	9.2
Finland	96	0	3	1	5	0	6	18	20	43	2.1	23.5
France	2,378	191	188	165	124	44	213	478	505	470	165.6	450.3
Germany	610	41	53	56	41	10	41	118	129	121	46.7	110.5
Greece	18	1	4	2	3	0	1	3	2	2	2.3	2.2
Hungary	12	0	0	0	0	0	2	3	4	3	0.0	3.2
Ireland	65	8	5	9	9	3	8	7	7	9	7.9	8.4
Italy	2,132	180	215	255	278	67	215	289	335	298	231.4	307.3
Latvia	1	0	0	0	0	0	0	0	0	1	0.0	0.3
Lithuania	0	0	0	0	0	0	0	0	0	0	0.0	0.0
Luxembourg	4	0	0	2	0	0	1	1	0	0	0.5	0.5
Malta	30	0	0	0	1	1	0	3	20	5	0.5	7.6
Netherlands	149	11	14	15	14	7	9	29	28	22	14.2	23.8
Poland	31	6	6	2	6	0	1	2	3	5	4.7	3.0
Portugal	108	13	16	8	7	3	10	13	27	11	10.9	16.5
Romania	146	6	22	25	16	3	18	17	27	12	16.7	20.0
Slovakia	7	2	1	1	0	0	1	0	2	0	0.9	0.8
Slovenia	65	9	6	14	5	2	7	5	8	9	8.4	7.8
Spain	369	23	19	21	16	3	29	54	102	102	19.1	77.6
Sweden	34	0	1	1	2	0	3	7	10	10	0.9	8.1
Iceland	0	0	0	0	0	0	0	0	0	0	0.0	0.0
Liechtenstein	0	0	0	0	0	0	0	0	0	0	0.0	0.0
Norway	29	1	0	1	12	0	1	4	10	0	3.3	4.1
Total	**6,550**	**515**	**573**	**592**	**565**	**149**	**587**	**1,098**	**1,302**	**1,169**	**557**	**1,123**

Source: London Economics Europe and Spark Legal (2021), Figure 17, page 57.

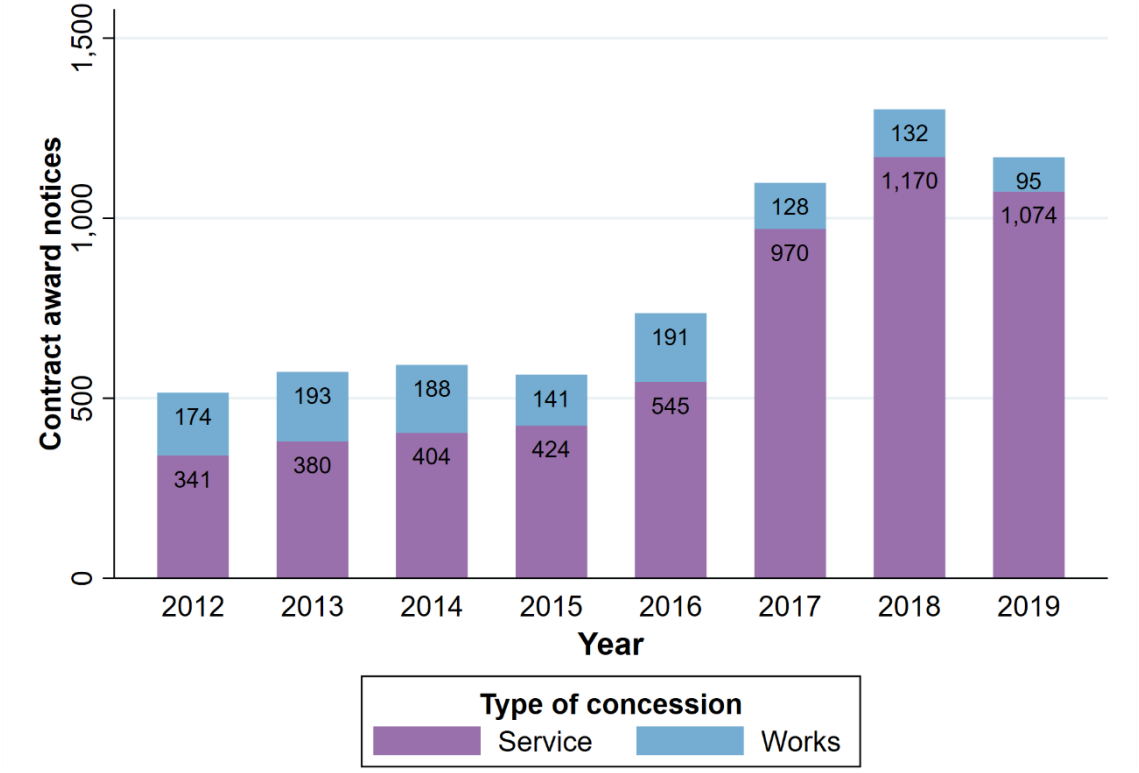
Analysis by type of contract - works and services

Concessions can be classified as being either for "works" or "services". Works concessions refer to public contracts that include the execution, or both the design and execution, of building or civil engineering works. Service concessions means public contracts having as their object the provision of services other than the execution and design of a work. Overall, the number of service concessions has been consistently larger than the number of works concessions, both before and after the transposition of the Concessions Directive.

The number of service concessions has increased considerably over time. Given how sharply this increase occurs, right after the expiry of the transposition period, this may be associated with the introduction of the Concessions Directive rather than, for example, being the result of a pre-existing trend. The share of service concessions in the total number of concession award notices increased from 66% in 2012 to 74% in 2016 and 92% in 2019.

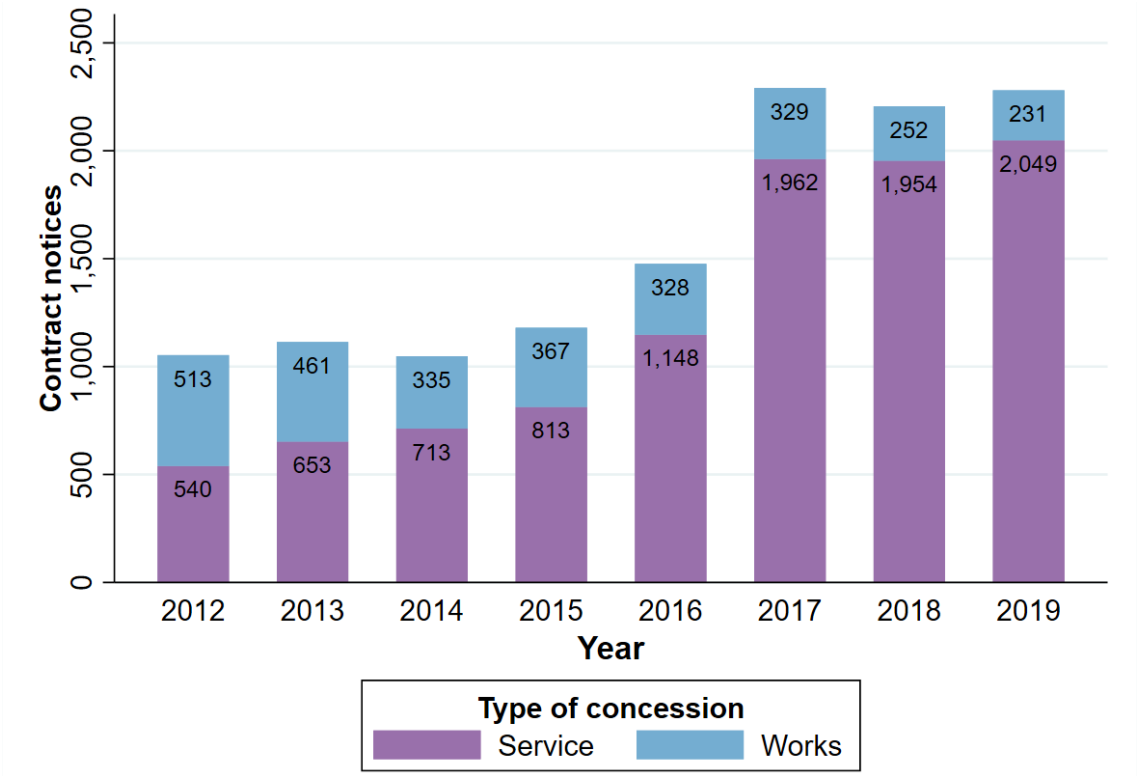
The situation of works concessions is very different. The number of works concessions have decreased between 2012 and 2019. The decline started already before the expiry of the transposition period and continued also afterwards, which suggest that is driven by factors independent of the Directive (i.e. overall variation in public contracting for works, changes in how contracting authorities report contracts, preference for fewer and higher value works contracts).

Figure 3: Concessions by contract type and year (concession award notices) [number]



Source: London Economics Europe and Spark Legal (2021), Figure 20, page 62.

Figure 4: Concessions by contract type and year (concession notices) [number]



Source: LE Europe and Spark Legal (2021), Figure 21, page 62.

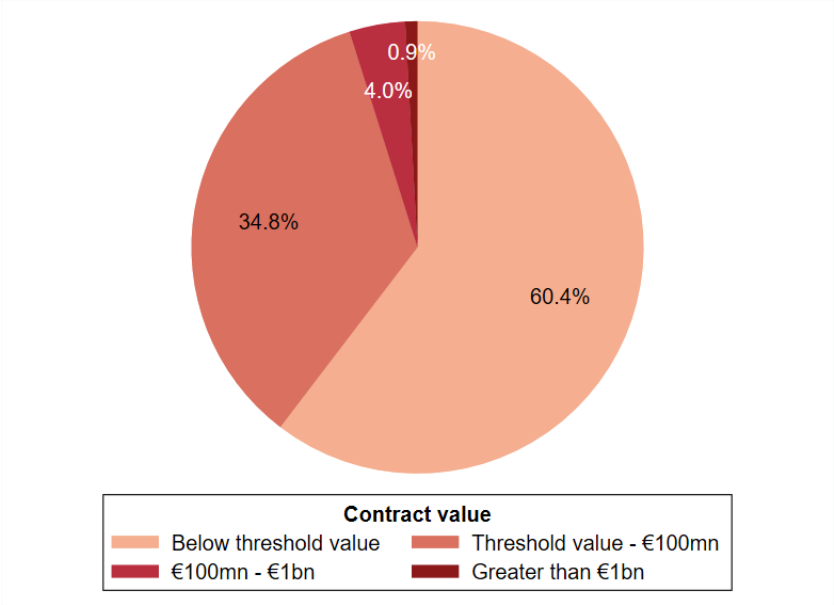
Concessions by value

The Concessions Directive applies to concessions with values equal or greater than a threshold which is currently set at EUR 5 382 000. According to Article 8(2) of the Concessions Directive, the value of the concession shall be calculated as the total turnover of the concessionaire generated over the entire duration of the contract, net of VAT. Each concession shall have a value.

The exact contract value of a concession appears nevertheless very difficult to determine from the information available in Tenders Electronic Daily. In the contract award notices, the majority of concessions have low values. While these values might be correct for some concessions, manual checks indicate that most cases seem to represent symbolic values, unit prices or monthly/yearly fees.

Figure *5* below displays the share of all concession awards for different sizes of contract values for the period 2012 to 2019. The majority of the number of identified concessions (60.4%) are below the threshold. The remaining concessions have a value between the threshold value and EUR 100 million (34.8%) and around 5% of concessions have values over EU 100 million. London Economics Europe and Spark Legal nevertheless estimate that the percentage of concessions with reported values below the threshold has decreased over the time, and especially after 2016. In the period pre-Concessions Directive period Directive this percentage was at 69% while in the post-Concessions Directive period the respective percentage was 57%.

Figure 5: Concession values 2012-2019 - categories (concession award notices) [number]



Source: London Economics Europe and Spark Legal (2021), Figure 43, page 90

The incorrect reporting of concession contract values in the Tender Electronic Daily database is a systemic problem linked to publication and transparency. This limits the conclusion that can be drawn from the data However, to avoid misrepresentations, concessions with values below the threshold have been removed and the analysis of values was performed only for concessions above the threshold.

Figure 6[12] below presents the distribution of above-threshold concession contract numbers and values for each of EEA countries in the post-concessions Directive period and in the post-Concessions Directive period.

In almost all countries, the median value is lower than the average value in both the pre- and post-Concessions Directive period. This indicates that a large number of concessions have a relatively low value and the average is driven by a few high values. However, for some Member States, such as Ireland, Latvia, Netherlands, Portugal, Slovakia and Sweden which display very large average values, this is likely driven by the low number of observations[13].

The possible correlation between the Concessions Directive and the size of contract values is not consistent across countries. Post-Concessions Directive, in 12 countries median values decreased and in nine countries increased. Similarly, ten countries experienced a decrease and 11 countries an increase of the average value, in the same period. The remaining nine countries had no above-threshold concessions in at least one of the pre- or post-Concessions Directive periods.

[12] Cells in grey indicate that the figures are based on less than 10 observations.

[13] For example, Sweden's large average value in the pre-Directive period was due to a concession for the design, manufacturing, operation and maintenance of offshore wind turbine generators. Slovakia's large average value after the Directive was due to a concession for the design, construction, financing, operation and maintenance of motorway sections. Latvia's large average value after the Directive was due to a concession for waste management in its capital city.

After the expiry of the transposition deadline, there were large increases in the average value of concessions in Belgium and France, and large decreases in the Italy and Spain. These changes were predominantly driven by changes in the number of contracts worth over EUR 100 million.

Figure *6* below indicates that France was the main driver of the increase in the average contract value after the transposition deadline. France saw a significant increase in both the number of post-Concessions Directive above-threshold concessions and the average value of those concessions. France's share of the total contract value across all EU and EEA countries rose from 27% pre-Concessions Directive period to 82% post-Concessions Directive.

Figure 6: Total number, total value, median value and average value for above-threshold concessions in EEA countries, pre-and post-Concessions Directive (concession contract award notices)

	Number		Total value		Median		Average	
	Pre	Post	Pre	Post	Pre	Post	Pre	Post
Country	#	#	*€, millions*	*€, millions*	*€, millions*	*€, millions*	*€, millions*	*€, millions*
France	221	988	10,712	159,138	15.3	20.8	48.5	161.1
Italy	140	266	9,161	10,660	11.0	11.2	65.4	40.1
Germany	28	164	635	5,404	17.2	17.2	22.7	33.0
Spain	38	140	8,296	7,201	14.0	18.3	218.3	51.4
Romania	16	37	529	999	15.2	18.2	33.1	27.0
Netherlands	6	23	654	1,020	93.3	21.6	108.9	44.4
Belgium	10	17	190	569	12.9	15.0	19.0	33.5
Norway	3	12	35	1,053	12.7	19.4	11.6	87.8
Finland	2	11	39	275	19.5	12.0	19.5	25.0
Croatia	1	10	29	326	28.5	22.9	28.5	32.6
Czechia	---	10	---	367	---	12.4	---	36.7
Denmark	17	10	1,457	905	43.3	20.9	85.7	90.5
Hungary	---	9	---	143	---	12.8	---	15.8
Ireland	5	9	2,214	2,204	415.0	270.0	442.8	244.9
Portugal	5	9	3,514	278	16.1	9.3	702.7	30.9
Sweden	1	8	550	383	550.0	18.0	550.0	47.9
Poland	7	7	298	853	23.9	31.8	42.6	121.9
Slovenia	16	6	311	80	15.2	13.1	19.4	13.3
Estonia	1	5	30	49	30.0	9.3	30.0	9.8
Austria	1	3	15	176	15.0	12.0	15.0	58.6
Greece	4	3	257	121	66.0	46.3	64.2	40.5
Bulgaria	2	2	48	13	24.1	6.3	24.1	6.3
Malta	---	2	---	38	---	18.8	---	18.8
Slovakia	3	2	99	1,963	39.9	981.6	33.0	981.6
Latvia	---	1	---	676	---	676.1	---	676.1
Cyprus	---	---	---	---	---	---	---	---
Lithuania	---	---	---	---	---	---	---	---
Luxembourg	---	---	---	---	---	---	---	---
Iceland	---	---	---	---	---	---	---	---
Liechtenstein	---	---	---	---	---	---	---	---
Total	**527**	**1,754**	**39,071**	**194,893**			**74.1**	**111.1**

Source: London Economics Europe and Spark Legal (2021), Figure 48, page 97.

It is worth noting that following 18 April 2016 there was a substantial increase of contracts above EUR 100 million and EUR 1 billion. Most concessions worth over EUR 1 billion in the whole of the EU were awarded in France: 39 of 50 over the entire time period. 20 of the concessions worth over EUR 1 billion related to the electricity sector, while the majority of the others related to telecommunications networks, heating and gas distribution, public transport, and transport infrastructure, such as roads. 21 of the 50 concessions worth over EUR 1 billion were awarded without prior publication of a contract notice.

4. TRANSPOSITION

Under Article 51, Member States had to transpose the Concessions Directive into national law by 18 April 2016. At the expiry of the transposition period, only six Member States had communicated all the necessary measures to the Commission. To date, all EU Member States have notified the Commission having adopted all the measures required to implement the obligations of the Concessions Directive in their respective domestic laws.

Entry into force of national legislation transposing the Concessions Directive

EU Member State	Date of transposition	EU Member State	Date of transposition
Austria	05/10/2018	Italy	19/04/2016
Belgium	30/06/2017	Latvia	16/05/2017
Bulgaria	01/01/2018	Lithuania	01/01/2018
Croatia	22/07/2017	Luxembourg	09/07/2018
Cyprus	17/02/2017	Malta	28/10/2016
Czechia	01/10/2016	Netherlands	01/07/2016
Denmark	01/01/2016	Poland	13/12/2016
Estonia	01/09/2017	Portugal	01/01/2018
Finland	01/01/2017	Romania	26/05/2016
France	01/04/2016	Slovakia	18/04/2016
Germany	18/04/2016	Slovenia	12/02/2019
Greece	08/08/2016	Spain	26/02/2020
Hungary	01/11/2015	Sweden	01/01/2017
Ireland	18/05/2017		

Source: London Economics Europe and Spark Legal (2021)

An initial assessment of the national transposition measures identified that only ten Member States (Austria, Belgium, Croatia, Denmark, Ireland, France, Luxembourg, Latvia, Malta and Slovakia) were in full conformity with all the obligations of the Concessions Directive. The Commission therefore launched infringement proceedings

against the remaining 17 Member States in January 2019, October 2019, June 2021 and December 2021. The proceedings against Cyprus, Portugal, and Romania have been formally closed following the notification of amendments by those Member States. The remaining proceedings are still ongoing and essentially concern elements which are important for the proper application of the Concessions Directive, such as its scope, the criteria for exclusion of economic operators and the modification of contracts. Some of the infringement procedures concern both the Concessions Directive and the other two public procurement directives and should not be formally closed before all pending issues (regardless of the concerned Directive) are addressed. In this respect, it may appear that some Member States have ongoing infringements even if, strictly speaking, issues related to the transposition of the Concession Directive may have been solved in the meantime.

The Concessions Directive was transposed by means of new acts (i.e. in Czechia, Denmark, Estonia, France, Greece, Croatia, Hungary, Ireland, Malta Poland, Portugal, Romania Spain, Slovakia and Sweden), by amendments to existing legislation (i.e. in Germany, Lithuania, Latvia and the Netherlands) or a combination of the two (i.e. in Austria, Belgium, Bulgaria, Finland, Italy and Luxembourg).

In most Member States, the legal acts transposing the Concessions Directive were adopted by the national parliaments. However, in Denmark, Ireland and Portugal the transposition was conducted through governmental regulations while in Belgium and Romania the transposition was conducted by a combination of both.

In addition to measures adopted at national level, four Member States (i.e. Austria, Belgium, Spain and Croatia) have also adopted additional regional measures. A summary of the scope of the regional measures is provided below:

Regional transposition measures

Member State	Summary of measures at regional level
Austria	Nine regional laws were introduced, one for each federal states in Austria. However, thy can only regulate the protection, control and/or review proceedings.
Belgium	All three regions have used this right and introduced regional measures to specify certain provisions, such rules on soil management and remediation in the Brussels Capital Region.
Spain	Some regions have adopted regional legislation, such as Aragon - for urgent measures for the speeding up, rationalisation and transparency of small-scale public sector contracts and Extremadura for socially responsible public procurement.
Croatia	The local and regional self-government units are obliged to prescribe who has the competence to make the decision to award/annul concessions, to alter such decisions, and to terminate the concessions contract.

Source: London Economics Europe and Spark Legal (2021), based on Table 1, page 12.

In a number of Member states, national transposing measures have gone beyond the provisions of the Concessions Directive. This is for instance the case for the thresholds above which the Concessions Directive applies (Article 8). Eight Member States apply some or all the provisions of the Concessions Directive to concessions below the EU threshold. Consequently, requirements and administrative procedures set out in the Directive would apply to concessions presenting a lower level of cross-border interest under EU law. This is also the case for the obligation for contracting authorities/entities to inform a tenderer of the characteristics and relative advantages of the tender selected, as quickly as possible, and in any case within 15 days from receipt of a written request. Three Member States require the information on the characteristics and relative advantages of the tender selected to be provided, as a rule, with the contract award decision, and not only upon request of the tenderer. One Member State has also transposed the provision on award criteria in a more stringent way since the national legislation requires providing information within five working days. Such transposition in national law is not contrary to the Concessions Directive but may result in administrative burden for the contracting authority.

Article 12 **excludes the water sector from the scope of the Directive**. When transposing the Concessions Directive, 21 Member States have excluded the water sector from the scope of the national measures transposing the Concessions Directive. Romania, Poland and Czechia decided to apply the Directive to the water sector, while France, Spain and Bulgaria apply it only partially.

National Guidance

In order to support the application of the Concessions Directive and institutional capacity building, national authorities in nine Member States (Belgium, Bulgaria, Estonia, Greece, Finland, Croatia, Lithuania, Sweden and Slovenia) have issued concession specific guidance[14]. Other Member States (Austria, Cyprus, Denmark, France, the Netherlands, Romania and Slovakia) have issued more horizontal guidance, covering public procurement and public private partnerships (PPPs) which may include also concessions. The guidance takes different forms (e.g. guidelines, explanatory documents, instructions), and can be binding or non-binding. In several instances the guidance is extremely detailed (e.g. providing templates, good-practice examples, explanations for a wide range of stakeholders, etc.).

While some Member States provide simplified versions of public procurement acts, others provide additional information, such as explanatory notes and best practices. Some elements that stand out positively in the comparative analysis are:

- a clear distinction between concessions and PPPs (or other public procurements) and guidance specific to concessions can help in the (correct) application of the Concessions Directive;
- guidelines addressing the questions and point of view from both national authorities and economic operators;
- templates and best practices cases that provide a correct interpretation of the regulation/guidelines and illustrate their application;

[14] At EU level, no concession-specific guidance was issued so far.

- published responses to specific questions posed by public authorities (or economic operators), which might clarify issues that multiple stakeholders are facing;
- provision of multiple documents in different formats (and languages) makes the process more accessible and clarifies certain aspects by approaching topics from different angles.

The summary of the guidelines is provided below:

National Guidelines

Member State	Description of guidelines
Belgium	The guidelines consist of binding ministerial circulars (e.g. setting out payment deadlines and penalties), non-binding manuals for federal authorities, federal agents or businesses, explaining a specific part of the concession process (e.g. e-Tendering), and guidelines/best practices assisting stakeholders in the concession process (both public authorities and private stakeholders), with a specific goal (e.g. fight against social dumping).
Bulgaria	The guidelines consist in methodological instructions – both general instructions and instructions in response to queries from grantors, which are made publicly available[15] . It also include suggestions (good practices) to be implemented, such as joint concessions with several concessionaires for big infrastructural projects, concessions where the investment comes both from private and EU funding and joint concessions with the participation of the State and one or more municipalities.
Croatia	There are two (legally binding) acts clarifying the rules on concessions: the Regulation on Standard Forms and their Publication[16] governs the lay-out and content of standard forms and their publication and the Ordinance on the Register of Concessions[17] (e.g. the form and keeping of the Register, subjects registered, submission of documentation for entry, payment and registration of the concession fee, etc.)
Estonia	Examples of guidelines for concessions include the support material for the assignment of CPV codes for social and special services and ordinary services[18], and video guidelines about the legal amendments made by the Public Procurement Act (transposing the Concessions Directive) available on the website of the Ministry of Finance[19]. The guidelines are directed at contracting authorities as well as economic operators. Moreover, the City of

[15] https://nkr.government.bg/Information/GetPage/7efda5ef-2f02-4c72-bd29-95f424e9f9f6.

[16] Uredba o standardnim obrascima i njihovoj objavi (Narodne novine br. 100/17), Regulation on Standard Forms and their Publication (Official Gazette no. 100/17), 19 October 2017.

[17] Pravilnik o registru koncesija (Narodne novine br. 1/18), Ordinance on the Register of Concessions (Official Gazette no. 1/18), 15 January 2018.

[18] Available at: https://www.rahandusministeerium.ee/et/eesmargidtegevused/riigihangete-poliitika/kasulik-teave/riigihangete-juhised - last accessed on 1 December 2020.

[19] https://www.youtube.com/watch?v=Szp9XmJOXXo&list=PLyJxFhmTNvV9g2pv1Qas9H0xwOYnNWSF2&index=7 and https://www.rahandusministeerium.ee/et/eesmargidtegevused/riigihangete-poliitika/kasulik-teave/riigihangete-juhised - last accessed on 1 December 2020.

	Tallinn has provided model documents which include samples for public procurement documents and contracts, including for concession contracts[20].
Finland	The government issued a guidebook to public procurements in which a chapter is dedicated to legal requirements for concessions[21].
Greece	Guidance includes explanatory documents and instructions (non-binding documents) on various matters on the application of law on concessions, templates relating to every stage of the award procedure.
Lithuania	Best practices are provided on the website of PPP Lithuania[22]. The online webpage developed by PPP Lithuania lists 36 public-private partnership projects, of which half were implemented under concession agreements. Most of these projects concern the sector of tourism (e.g. camping) and its infrastructure, active leisure activities and sports (e.g. various sports centres). Furthermore, methodological documents (e.g. a template) are provided for concession agreement[23] and the evaluation of tenderers.
Slovenia	Guidance on specific rules for awarding concessions in certain sectors (e.g. social assistance[24] and services for the labour market[25]).
Sweden	Online, non-binding guidance on how to procure concessions[26].

Source: LE Europe and Spark Legal (2021), based on Table 6, page 112

5. ASSESSMENT OF THE APPLICATION OF THE CONCESSIONS DIRECTIVE

Prior to 18 April 2016 – the deadline for transposition by Member States, the award of works concessions was partly covered by a limited number of provisions in the EU public procurement legislation (e.g. works concessions awarded by contracting entities were not covered). Service concessions were only covered by the general principles of the TFEU as interpreted by the EU courts.

This loophole was considered to distort the internal market and in particular limited access by European businesses, especially SMEs, to the economic opportunities offered by concessions. The lack of clear and adequate definitions of concession contracts and the broad character of the obligations arising from the Treaty were further considered to cause significant economic inefficiencies.

The Concessions Directive therefore aims at reducing the uncertainty surrounding the award of concessions, by providing for certainty on the legal framework and improving access to the concessions markets by increasing transparency and fairness in award procedures. This Chapter presents the extent to which these two key objectives have been pursued and achieved since 18 April 2016 - the transposition deadline.

[20] Available at: https://www.tallinn.ee/est/Kontsessioon - last accessed on 3 December 2020.
[21] Valtion hankintakäsikirja 2017, Publication of the ministry of finance 29/2017, accessible on <https://vm.fi/documents/10623/4040240/Valtion+hankintak%C3%A4sikirja+2017/868b80fa-c2de-4328-ae93-36b17968f780/Valtion+hankintak%C3%A4sikirja+2017.pdf?version=1.0> 201-203.
[22] https://www.ppplietuva.lt/lt/valstybes-strateginiu-tikslu-ir-finansu-valdymo-tobulinimas/gerosios-praktikos.
[23] https://www.ppplietuva.lt/en/publications/annex-no-8-to-the-recommendations-partnership-concession-agreement-services
[24] http://www.pisrs.si/Pis.web/pregledPredpisa?id=PRAV5639.
[25] http://www.pisrs.si/Pis.web/pregledPredpisa?id=PRAV10456.
[26] https://beta.upphandlingsmyndigheten.se/regler-och-lagstiftning/luk/.

5.1. Legal certainty

The Concessions Directive intends to provide legal certainty in two ways: by providing for more precise definitions and by providing for rules incorporating Treaty principles relevant to the award procedure.

One of the main take-away from the Stakeholders' Event was that the Directive provides a good balance between legal certainty and flexibility (e.g. in terms of choice of procedure), however more flexibility may be needed with regards to concession contract modifications as concessions are generally long term. Legal certainty, in particular, in terms of transparency, was indicated as one of the main benefits brought by the Directive.

The definition of "concessions"

The Concessions Directive defines concessions as written contracts between one or more contracting authorities or contracting entities and one or more economic operators (concessionaire), where the latter is entrusted with the execution of works or the provision and management of services and is remunerated by being given the right to exploit the respective works or service, or by being given this right together with payment[27].

Notwithstanding the clarification provided in the Concessions Directive, discrepancies regarding the meaning and use of the notion of concessions remain significant in Member States and the term concession within the meaning of the Directive is used for sectors and issues that go beyond the Concessions Directive. For example, in the majority of Member States, national legislation other than the transposing one use the term "concession" to refer to other legal concepts, such as authorisations, licenses or other public contracts. In several Member States the use of the term concessions also relates to the concessions that are excluded from the scope of the Concessions Directive. In a few Member States a different term than concessions is used in non-transposing legislation to designate concessions in the sense of the Concessions Directive.

The definitions and interpretation was also identified during the Stakeholders' Event as one of the main obstacles when using the Directive.

It cannot be excluded that these discrepancies lead to higher costs as economic operators participating in cross-border concessions cannot rely on one specific meaning of concessions. It may also lead to time-consuming misunderstandings on the side of both

[27] This is to be distinguish from "authorisations or licences" which involve a public authority establishing conditions for a contractor to carry out a certain operation. Under a concession contract, a concessionaire in executing the works or services must meet specific legally binding and enforceable requirements as defined by the contracting authority. This stands in contrast with the conditions to carry out an operation which are set for the granting or an authorisation or licence. Whereas an authorisation or licence provides a contractor with the right to exploit that authorisation or licence, a concessionaire is under an obligation. Moreover, for authorisations or licences, it is the economic operator requesting the contract to be granted, whereas it is the contracting authority initiating the awarding of a concession. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36) applies to authorisations and licences.

contracting authorities/entities and economic operators about not only the meaning and understanding of the applicable definition but also about what legislation applies.

The definition of "operating risk"

The Concessions Directive defines the notion of "operating risk." Concession contracts always involve the transfer to the concessionaire of an operating risk of economic nature. This means that the concessionaire may not recoup investments made and the costs incurred in operating the works or services awarded under normal operating conditions, even if a part of the risk remains with the contracting authority or contracting entity.

The presence of an operating risk is what differentiates concession contracts from other types of public contracts. Therefore, the transposition of this notion is key to ensure the correct implementation of the Concessions Directive. Yet only four Member States have transposed the concept exactly as set out in the Concessions Directive. Over twenty Member States transposed the concept of operational risk through slightly different wording than the one provided in the Directive, and two Member States did not address the operational risk at all in national transposing legislation. At this stage it is not possible to say whether these discrepancies are of relevance. Different interpretations of operating risk could mean that public procurement for the same type of work or service provisions will be treated differently among Member States and in some not even be subject to the Concessions Directive.

Procedural guarantees aiming to ensure a fair and transparent award procedure

The Concessions Directive has codified a series of procedural guarantees aiming at ensuring a fair and transparent concessions award procedure. For example, there are obligations relating to the selection and award criteria to be used by contracting authorities/entities when awarding concessions, there are rules on publication to ensure transparency and fairness, minimum deadlines for the submission of tenders and for the publication of contract award notices in procedures for award of concessions, and the concessions Directive provides for an extension of the scope of application of the Remedies Directives[28] to all concession contracts above the threshold in order to guarantee the possibility for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

During the stakeholder event, transparency, was identified by the participants as one of the main benefits brought by the Directive.
At the same occasion it was expressed the view that access to remedies enhances objectivity, transparency, equal treatment of tenderers, by the contracting authorities which act knowing that they can be controlled by a judge.

Provisions on contract modification

The Directive includes specific provisions on concession contract modification which incorporates the basic solutions developed in the case law and provide practical solutions

for dealing with unforeseen circumstances requiring a concession to be modified during its term.

Contract modifications are nevertheless considered a sensitive issue, and in particular contract modifications without a new opening of competition are a concern from the perspective of effective competition and transparency. The Concessions Directive provides detailed rules clarifying the conditions in which contract modifications without a new opening of competition can take place. Austria and Slovakia provide guidance on contract modifications and eleven Member States (Austria, Bulgaria, Croatia, Czechia, Hungary, Italy, Latvia, Portugal, Romania, Slovakia and Spain) have introduced an express requirement that any modifications must be approved by a government authority other than the procuring authority responsible for the initial contract.

Despite such measures, modification of contracts during their term, including wrongful extension of contracts and amendments without a new call for competition are reported as a source of wrong application of the rules.

Distinguishing concessions from other public private partnerships

The Concessions Directive also clarifies the case in which a contract concluded between a contracting authority and an economic operator is not subject to the application of the concession award rules. This has been guided by the principles set out in the case law of the European Court of Justice. This is relevant as there is no EU law defining and regulating the concept of public private partnership.

In practice, the relationship between public private partnerships and concessions is very close, as the latter are usually considered a particular form of such a partnership. Public private partnerships in many cases constitute either public contracts or concessions.

Nonetheless, the following non-legislative document have been published on public private partnerships: the Green Paper on public-private partnerships (2004) defines public private partnerships as "*forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service*."

Member States have taken different approaches in relation to legislating public private partnerships. Although some of the national legal frameworks or rules on public private partnerships specify how such partnerships relate to the rules on concessions, in other Member States there are diverging definitions of the term public private partners at national level and/or less clarity as to how legislation on this topic refers to the definition of, and rules on, concessions.

5.2. Application and enforcement - sources of incorrect application of the rules for the award of concession contracts

In the context of monitoring and transparency requirements[29], the Commission received 26 reports in 2018 (all Member States except Austria and the UK) and the same number

[29] Article 45 of the Directive 2014/23/EU as well as under Articles 83 and 85 of Directive 2014/24/EU, and Articles 99 and 101 of Directive 2014/25/EU

in 2021 (all Member States except Portugal)[30]. Due to the delayed transposition, Member States' reports of 2018 cover only year 2017 and the reports of 2021 cover the period 2018 to 2020. Overall, the reports covered the period between the 1 January 2017 and 31 December 2020.

With the exception of Bulgaria and, to a certain extent, Italy which reported separately on issues specific to concessions, the vast majority of Member States' reports do not differentiate between the three EU procurement Directives, therefore the information reflects horizontal procurement aspects without linking it to a specific type of procurement (public contract or concession). Most of the Member States have transposed the three Directives into one single law and have appointed one Public Procurement Monitoring Authority. Moreover, concessions represent a very small proportion of the number of public procurement procedures. Nevertheless, whenever possible, specific examples on concessions are provided. Information in the Member States Reports was complemented with a desk research of the websites of relevant national authorities in charge of different aspects of public procurement and concessions. This section is based on the reports complemented by the desk research.

By analysing the above-mentioned information made publicly available by the Member States it is evident that all Member States have made significant efforts to put in place monitoring authorities and structures to ensure an efficient application of the rules for award of concessions. There are still some aspects which appear to be problematic and which cause incorrect application and sometimes illegal behaviour. The two sections below depict those issues. Throughout these sections whenever examples of Member States are enumerated in relation to a specific issue, it is to be noted that lists are by no means exhaustive.

Most frequent sources of incorrect application, including possible structural or recurring problems in the application of the rules

A. This section presents the most common **legal provisions indicated as problematic** by contracting authorities and entities when concretely applying the rules and matters which requested clarification or guidance from the national or regional authorities.

Concerning the award criteria, contracting authorities and entities appear to find it difficult to formulate proportionate, proper and meaningful quality criteria, including those involving strategic public procurement (green, socially responsible and innovative) and establishing a relevant link with the subject matter of the procurement (e.g. Bulgaria, Germany, Croatia, Cyprus, France, Italy, Latvia, Spain[31] and Sweden). The Commission considers green public procurement as an important instrument to stimulate the demand for net-zero products at large scale as recently reflected in the Green Deal Industrial Plan[32].

[30] The original reports as submitted by Member States are available at the following address: https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en.

[31] Spain reports that levels of non-compliance lie between 33.89 % and 26.58 % were detected.

([32]) Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions - *A Green Deal Industrial Plan for the Net-Zero Age*, COM(2023) 62 final, 1.2.2023.

Further to that, Italy reports in relation to concessions that award criteria are sometimes not objective (e.g. precedence in the tendering for who has been residing in the region for the two preceding years). Similarly, the interpretation and verification at tender stage of the exclusion grounds was reported as being difficult in Belgium, France, Latvia and Italy.

Almost half of Member States indicated receiving clarification questions regarding the possibility to use the negotiated procedure without publication (e.g. under which conditions this procedure can be used[33] without violating the law). Additionally, many Member States indicated that the procedure was wrongfully applied (Austria, Croatia, Cyprus, Finland, Greece, France, Italy[34], Luxembourg, Lithuania, Spain and Sweden). Romania reported excessive use of negotiated procedures without prior publication, which is not provided with a sufficient description in the legislation and good practices guidelines.

Difficulties appear to exist also in respect of the delineation of the contract type, notably the distinction between public contract and concession (France, Malta, Poland and the Netherlands). Poland reported specific issues on the relationship between public procurement rules and concession rules in the context of admissibility: the joint award of concessions by several contracting authorities, the modification of the concession contract and the admissibility of new contracting authorities to join the contract during the term of the concession contract, and the conduct of a procedure for the award of the concession by a proxy. Italy reports as specific to concessions, the situation of mixed concessions via third party management. The Italian authorities have decided that a concessionaire can grant 80% of the activity to a third party if the procedure is transparent and public and the concession value should have a threshold of at least EUR 150 000. This has created interpretative problems with other types of concessions. Another example is found in the case that took place in Austria before the Federal Administrative Court (*Bundesverwaltungsgericht* – 'BVwG') regarding the question whether the award of a tobacconist's shop is a service concession pursuant to the Austrian Federal Concessions Procurement Act 2018[35]. The Federal Administrative Court ruled that the tobacconist is not subject to instructions from a contracting authority, thus, the content of the alleged service is a special authorisation, and the tobacco licence does not constitute a service concession under § 6 of the Federal Concessions Procurement Act 2018[36]. However, in a second decision the same Court ruled the opposite arguing that the operating risk was borne by the concessionaire and the concession contract contained mutually binding obligations. On the basis of those circumstances, the Court concluded that the Federal Concessions Procurement Act 2018 was applicable[37]. These cases demonstrate some of the challenges in the classification of public contracts as concessions contracts.

[33] Sweden reports that all exemptions allowing direct awards are a source of legal uncertainty and in certain cases incorrect application

[34] Italy indicates specifically this issue in respect of concessions.

[35] the Federal Concessions Procurement Act 2018 – 'FCPA 2018' (Bundesvergabegesetz Konzessionen – BVergKonz 2018)

[36] LE Europe and Spark Legal, Study on the implementation of the Concession Directive, final report (2021) European Commission DG GROW, p 140.

[37] LE Europe and Spark Legal, Study on the implementation of the Concession Directive, final report (2021) European Commission DG GROW, p 140.

Bulgaria pointed out to difficulties in determining the economic balance of the concession and the distribution of risks between the contracting authority or entity and the concessionaire.

As far as transparency is concerned, publication of prior information notices, contract notice[38] and contract award notices[39] is indicated as difficult in Romania, Spain and Sweden. There are only few Member States with data that are specific to concessions. In Bulgaria, this database primarily provides documentation for potential concessionaires and shows to whom concessions have been awarded; while in Croatia and Czechia, the data sources are similar to public contracts databases, but specifically for concessions[40]. Although 29 out of 30 EU and EEA countries have an online platform where concession notices can be viewed[41], good practices should be applied more widely across countries, as transparency issues are often reported.

B. The most **frequent sources of incorrect application of rules**, are concentrated around several issues.

Many Member States invoke as source of incorrect application linked to the lack of professionalisation of the human resources, such as the lack of procurement skills and insufficient knowledge of the rules by practitioners (Cyprus, Greece, Denmark, Latvia, Lithuania, Italy, Romania and Slovakia) insufficient human resources (Bulgaria and Denmark) and or insufficient knowledge of the market (Belgium, Greece, Slovenia and Romania). According to Romania, lack of procurement skills may cause different interpretation and inconsistency by public authorities[42].

Modification of contracts during their term, including wrongful extension of contracts and amendments without a new call for competition are another source of wrong application frequently mentioned (Germany, Croatia, Finland, Latvia, Italy, Luxembourg, and Spain). Italy who indicates specifically this issue in respect to concessions also explains that due to the pandemic, this practice has been used often. The Italian National Competition Authority pointed out that this is particularly problematic when talking about concessions for ports for example, maritime concessions and motorway concessions, as it postpones the competition.

Member States mention also difficulties related to the calculation of the estimated value of the procurement or concession, or wrongful calculation of the value as below the threshold, to avoid application of the public procurement rules (Belgium, Bulgaria, Germany, France, Latvia, Luxembourg, Lithuania, the Netherlands and Sweden). It is worth noting that Sweden reports difficulties linked to the calculation of the value of

[38] Prior information notices and Concession notices are published by the Contracting authorities and Entities to announce the intention to tender out works or services.

[39] Concession award notices are published at the end of the tender procedure, and contain information on the outcome of that procedure.

[40] LE Europe and Spark Legal, Study on the implementation of the Concession Directive, final report (2021) European Commission DG GROW, p 127.

[41] LE Europe and Spark Legal, Study on the implementation of the Concession Directive, final report (2021) European Commission DG GROW, p131.

[42] Romania country report, available at: Country reports and information on EU countries (europa.eu)

services concessions. A third of the Member States report the issue of artificial splitting into lots to award contract for lots below the threshold to avoid application of the public procurement legislation (Croatia, France, Greece, Latvia, Italy, Luxembourg, Lithuania, Romania and Slovakia). Another example is found in *APOCA Parking Danmark A/S v Region Hovedstaden*[43], which concerned the re-tender of a public service contract as a concession contract. In this case, several claims were made, including that the contracting authority was in breach of Article 8(2) and (3) of the Directive as the value of the concession and the method for calculating this value were not stated in the tender documents. The complaints board found that the contracting authority had breached Article 8(3) of the Directive, concerning the threshold and methods for calculating the estimated value of concessions, because it had not stated the method for calculating the value of the concession in the tender documents[44].

C. Additionally, there were identified patterns which are not illegal or non-compliant but which may be an indication of possible shortcomings in the implementation of the rules.

For instance, there appears to exist a preference of contracting authorities and entities to use the lowest price as award criterion since it is perceived as simpler and more objective (e.g. Slovenia indicated that contracting authorities use the price as sole criterion in 90% of the contracts). Best price-quality ratio is used in limited cases, due to fears of risks in compliance audits (Bulgaria, Cyprus, Latvia, Slovenia, Romania and Sweden).

Another pattern that emerges is the absence of, or insufficient, prior market consultation resulting in non-realistic or outdated specifications (Greece, Lithuania, Spain and Sweden).

As regards deadlines, Croatia points out the use of shortest possible deadlines for submitting tenders or requests to participate. On the other hand, Germany and Italy points out that the overall duration of procurement procedures is perceived as very long. Italy indicates specifically this issue in respect to concessions, while Germany indicate that the very long deadlines of EU public procurement law are perceived as an obstacle to responding flexibly to needs and market situations.

Finally, the lack of monitoring and control of the performance of concession contracts by the contracting authorities and entities after the award is mentioned in Bulgaria and Greece.

Fraud, corruption, conflict of interest and serious irregularities

Combating fraud, favouritism and corruption and taking measures to identify and remedy conflicts of interest in concessions is a legal obligation for Member States and contracting authorities and entities under Article 35 of the Directive. Member States outlined their legislative solutions, the institutional set-up, the "soft law" measures taken, and their prevention activities, with certain statistics on the functioning of the system. Most Member States do not differentiate between the three Directives, but issues related

[43] APOCA Parking Danmark A/S v Region Hovedstaden, verdict of 14 June 2019, https://klfu.naevneneshus.dk/media/documents/Apcoa_Parking_Danmark_AS_mod_Region_Hovedstaden.pdf (last accessed 22 November 2020).

[44] LE Europe and Spark Legal, Study on the implementation of the Concession Directive, final report, European Commission DG GROW, pp 146-147.

to fraud, corruption, conflict of interest and other irregularities are applicable horizontally through the three Directives. In the majority of cases, the general anticorruption and anti-collusion legislation and institutions precede the Directives.

Public procurement and concessions can be particularly sensitive to the emergence of cartels as they have features that make collusion easier or more attractive. For example, competing undertakings may secretly agree in advance who will make the offer, thereby manipulating the outcome of the public procurement procedure to their advantage[45]. In Sweden, the main findings of a survey on conflicts of interest indicated that the risk of undue influence is largest when there are family or friendship ties between employees and tenderers, and when using consultants to assist the contracting authority in a procurement; and corruption is most common either during the planning phase and preparation of the procurement documents or after a procurement has been completed, at contractual negotiations or during the contract period through influencing calls within the contract[46].

A. Responsible Authorities

In most Member States, national competition authorities are primarily responsible for carrying out such policies (e.g. in the Netherlands the Netherlands Authority for Consumers and Markets investigates fraud, collusion, corruption and conflict of interest in procurement procedures). However, few Member States have dedicated specific agencies to the monitoring of antifraud and anticorruption, next to the supporting role of the National Competition Authorities (Italy[47], France[48], Malta and Romania). Most of the authorities in charge of anti-corruption strategy also produce annual reports.

Among the different agencies, the importance of establishing and/or maintaining clear communication and cooperation channels between competition authorities, central procurement authorities and contracting authorities is generally acknowledged as a major element of the policy to fight collusion.

B. **Soft law measures** complement the legal framework

The "soft law" measures[49] are widely used and displayed the greatest coherence across Member States. They include national strategies against corruption, manuals and guidance notes (especially on methods to conduct market research, negotiations or to detect collusive behaviour), professionalisation, education and training, or codes of conduct for civil servants (when not set out in legislation) and sometimes also for economic operators. The focus devoted to soft measures shows that Member States are aware that activity in the field of integrity and anticorruption requires not just legal barriers, but also a positive influence on administrative culture, on personal behaviour and values (Belgium, Croatia, Lithuania, and the Netherlands). For example, Belgium

[45] Belgium country report, available at: Country reports and information on EU countries (europa.eu).
[46] Sweden country report, available at: Country reports and information on EU countries (europa.eu).
[47] Autorita' Nazionale Antifrode Anticorruzione
[48] Agence Française Anticorruption
[49] Measures that do not amount to a strict legal obligation on the side of the practitioners of procurement and concessions.

published in 2017 a Guide named "Collusion in Public Procurement" to raise public buyers' awareness of the dangers and high costs of this prohibited form of cartel[50]. Likewise, Croatia reported that in order to raise public awareness on problems of bid rigging, the Croatian Competition Authority has recently published a guide for contracting authorities in detecting and tipping-off bid-rigging cartels in public procurement[51] and Estonia provided an account of diverse documents on the subject by the Ministry of Justice[52].

C. Conflict of interest

Further to that, most of the Member States provide some specific national measures for conflict of interests. Some Member States report more detailed rules on the definition of conflict of interests than the one provided by the Directives. In general, these pertain to clarifying family and personal links that fall admittedly in the scope of the notion of interest, as well as rules on shareholding in private companies (Hungary, Croatia)[53].

Many Member States indicate **declarations on the absence of conflict of interests**, impartiality and objectivity, as a measure used at national level. In some cases, there is a general obligation to declare any possible conflict of interest, with the obligation to publish that information (Hungary, Ireland, and Poland). In general, penalties for breach of such rules are in place. For example, Croatian legislation mandates for the contracting authority to: i) publish on its website a list of economic entities with which the representative of the contracting authority or its affiliated persons is in conflict of interest, or a notice that such entities do not exist (the information has to be updated without delay if changes occur); and ii) in the procurement documentation for a particular public procurement procedure, to provide a list of economic entities with which the representative of the contracting authority is in conflict of interests, or to indicate that such entities do not exist. If the contracting authority does not have its own Internet site, it is obliged to publish the list on the bulletin board, in the Official Gazette or otherwise make it permanently available to the interested public[54].

Provisions in contracts which are contrary to the rules regulating conflict of interests are null and void. Member States are currently pursuing collusion prevention and detection policies largely inspired by the OECD guidelines[55]. Measures to fight collusion that are common in Member States include: elaboration and dissemination of guidance on

[50] Autorite Belge de la Concurrence, Collusion dans le marche publics : guide pour le acheteurs charge des marches publics (2017) available at: 20170131_marches_publics.pdf (abc-bma.be).

[51] Aztn, Vodic Za Narucitelje u Otkrivanju i Prijavi Kartela u Javnoj Nabavi, available at: vodic_za_narucitelje.pdf (aztn.hr).

[52] Estonia, Conflict of Interest, available at: Conflict of interests | The Estonian Patent Office (korruptsioon.ee).

[53] Hungary, country report available at: Country reports and information on EU countries (europa.eu) p. 13. Croatian, country report available at: Country reports and information on EU countries (europa.eu) p. 17.

[54] Croatian, country report available at: Country reports and information on EU countries (europa.eu) p. 17.

[55] OECD Recommendation on Fighting Bid Rigging in Public Procurement available at: https://www.oecd.org/daf/competition/oecdrecommendationonfightingbidriggininpublicprocurement.htm.

detection, awareness-raising and training[56], direct helplines for reporting alleged cases and whistle-blower programs, leniency programmes for operators that come forward with information, criminal law sanctions for colluders and prevention activities (Estonia, Czechia, Malta, Slovakia). As far as training is concerned, Czechia, reported that through the Ministry of Regional Development they have implemented an education campaign for conflict of interests in the public contracts in 2018-2020[57].

As the countries with the largest number of concessions, France and Italy have reported the following:

Case Study - France

The report published by *l'Agence Française Anticorruption* in 2019 concluded that the public prosecutor's offices referred 813 cases of breach of probity, which reflects an increase of +12.6% compared to 2014 (722 cases referred). In the context of concession contracts, France reported that there is a risk associated with an undertaking responsible for the operation of a work which, before the expiry of the concession, promises a future profit-making job to a representative of the contracting authority in exchange for an extension of the concession. This type of behaviour was sanctioned by a court in France. The president of a tourist development company was fined EUR 15 000 and suspended 10 years in prison for active influence trafficking and to pay symbolic EUR 1 in damages to the municipality concerned.

Source: *l'Agence Française Anticorruption,* La mise en place d'un dispositif de prévention de risques de corruption dans le secteur du bâtiment et des travaux public (2022), available at : Guide_BTP_AFA_Web.pdf (agence-francaise-anticorruption.gouv.fr)

Case Study - Italy

In 2019, 40% of sanctions in public contracts by the Italian anticorruption authority were due to omissions or wrong declarations. The **Italian Antifraud Committee** reported that within public procurement: conflict of interests represented 7% of the irregularities, failure to comply with time limit to receive tenders represented 4%, non-compliance with time-limits of the award represented 3%, transparency problems represented 1%, extension of the award was 0.55%, and the remaining part was composed by "other".

Source: Autorita' Nazionale Anticorruzione, relazione annuale 2021 (2021) available at: Consulta i documenti - www.anticorruzione.it; Presidenza del Consiglio dei Ministri Dipartimento per le Politiche Europee, Annual Report (2019) available at: relazione-annuale-colaf-2019.pdf (politicheeuropee.gov.it)

5.3. Providing better access to the concessions market

The second main objective of the Concessions Directive is to improve the access of economic operators to the concessions markets. This is to be achieved by providing for principle-based provisions aimed at increasing the transparency and fairness of award procedures.

[56] Czechia, country report available at: Country reports and information on EU countries (europa.eu). Estonia, E-course on prevention of corruption and conflict of interest in the public sector, available at: E-course on Prevention of Corruption and Conflict of Interest in the Public Sector | The Estonian Patent Office (korruptsioon.ee).

[57] Czechia, country report available at: Country reports and information on EU countries (europa.eu).

The following indicators are used in this section to assess the extent to which better access to the market has been achieved:

- transparency trough publication;
- number of tender offers;
- SMEs participation in concession awards;
- cross-border[58] and foreign[59] participation in the EU concession market.

Finally, for a closer look of how the objective of providing better access to the market is achieved in different sectors, a special Chapter of this Staff Working Document is dedicated to a sectoral overview.

Transparency through publication

The Concessions Directive includes certain provisions directly obliging contracting authorities to publish a concession notice (or a "prior information notice" in the case of social or other specific services), which announces the intention to award a concession, and to publish a concession award notice, which announces the result of the tender procedure.

The publication of these notices can be tracked using Tenders Electronic Daily data. **Figure *8*** below, presents the number of publications – calls for competition, which gather prior information notices[60] or concession notices[61] and concession award notices[62].

Figure 8: Calls for competition and concession award notices by year [number]

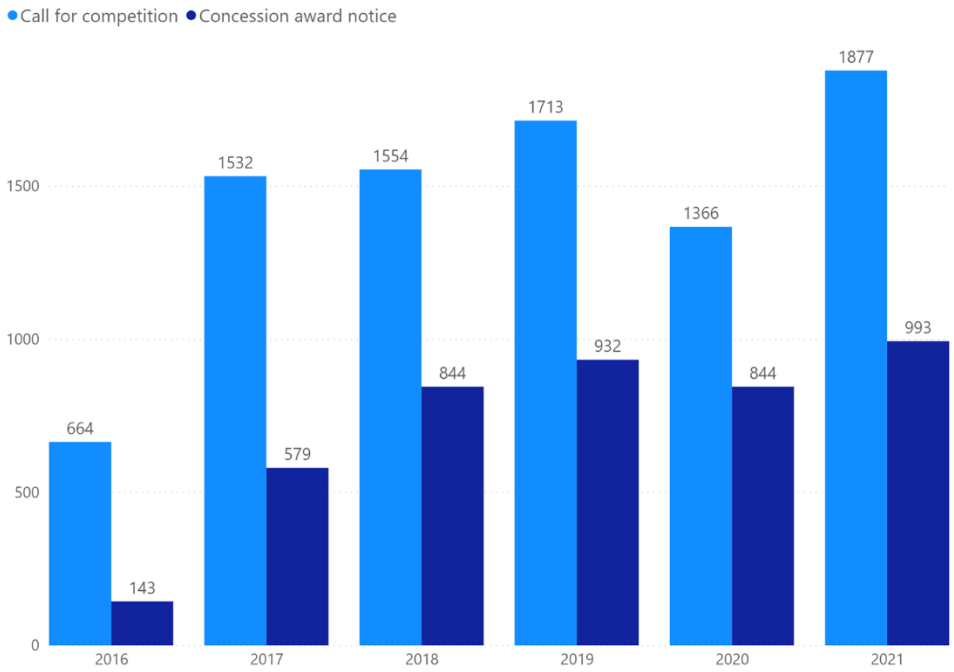
[58] Contracts awarded intra-EU by a contracting authority or contracting entity in one Member State to an economic operator from another Member State.

[59] Contracts awarded by a contracting authority or contracting entity in one Member State to an economic operator from a third country.

[60] Prior information notices concerning concessions for social and other specific services, as referred to in Article 31(3), published on standard form (SF) 23, whenever such form was used as a concession award notice.

[61] Concession notice - standard form (SF) 24.

[62] Concession award notice - standard form (SF) 25. Concession award notices containing information about cancelled or ineffective procedures (e.g. no offers submitted) were removed from the dataset.



Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data

The number of concessions for which calls for competition and award notices have been published has grown significantly since 2016. However, the figure shows a significant decrease in the number of calls for competition in 2020, as a result of the COVID pandemic and slowdown in economic activity. This however has not been reflected in the number of award notices in 2021 which are back to pre-COVID level. The significant increase in publication after 2016 can undoubtedly be interpreted as a clear sign of increased transparency in the call for competition and award of concession contracts.

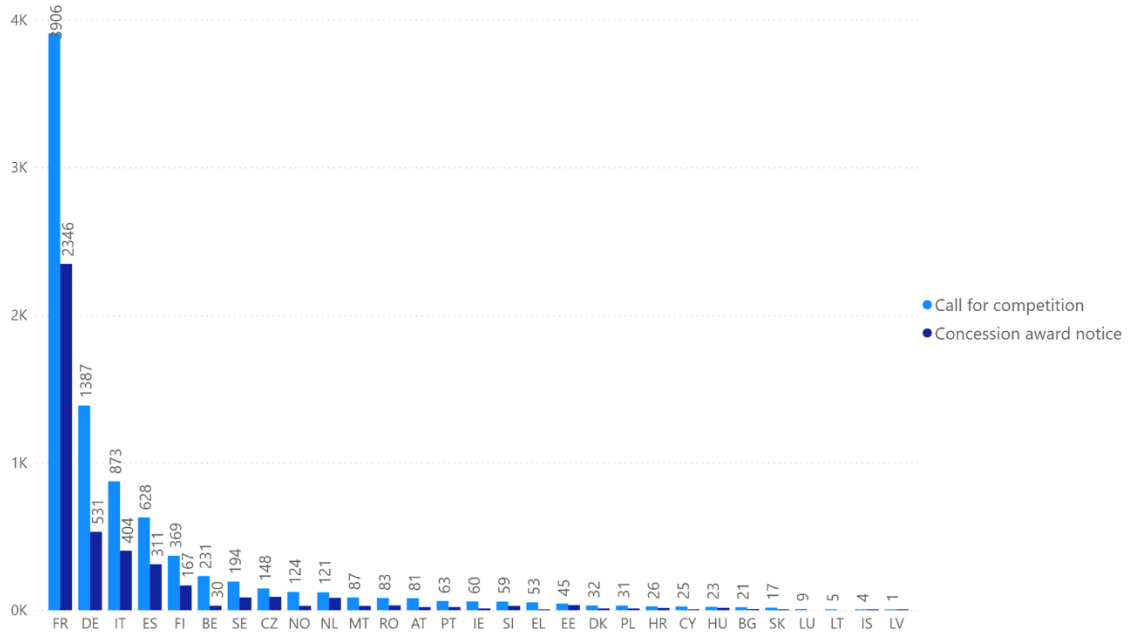
Figure *8* above however also indicates that the number of published concession award notices has constantly been significantly lower than the number of concession notices - invitations to tender. Around half of invitations to participate in a concession procedure resulted in awards of such contracts. There may be many reasons for this, including:

- contract notices can contain multiple lots or awards, which do not always match in one-to-one relationship;
- there may have been a number of cancelations of calls for competitions;
- some contracting authorities may not have been complying with the obligation to publish an award notice announcing the results within 48 days after the award of a concession).

According to London Economics Europe and Spark Legal (2021) a similar discrepancy between initiated and concluded concessions procedures had also been identified, during the 2012 to 2019 period hence, also before 18 April 2016 – the transposition deadline of the Concessions Directive.

When looking at the above two types of publications across EU Member States and the EEA, there seem to be a similar gap across all Member States and EEA countries, see **Figure *9*** below.

Figure 9: Calls for competition and concession award notices by country [number]



Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily for 2016-2021, EU-27 and EEA

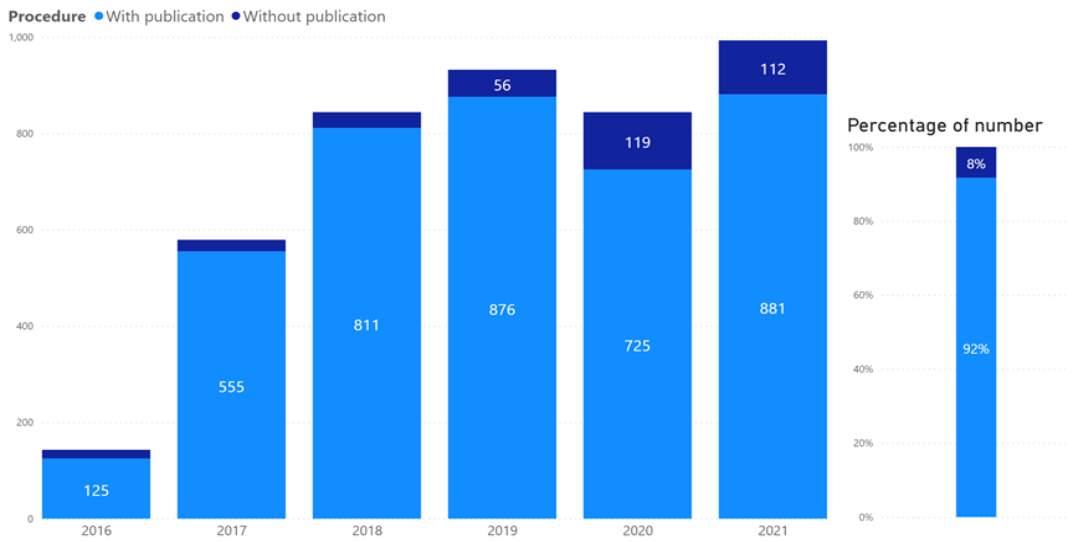
Because of its long-standing tradition in using concessions as a formula for delivering public services, France has published the largest number of calls for competition, as well as concession notices (nearly 4 000, compared to 2 300). Germany follows (1 300 calls for competition) and then Italy and Spain (873 and 628 invitations to tender, respectively).

Publication of concession contract notices

Transparency can be monitored through various aspects of the concession procedure. Such procedures for example can include the publication of a concession notice which is a sign of transparency and market openness. The Concessions Directive foresees cases and conditions where non-publication of such initial announcement is allowed (e.g. absence of competition for technical reasons of the existence of an exclusive right). The latter will for example occur frequently in the energy supply, which is discussed in more detail in the sectorial analysis.

Figure *10* below shows that a vast majority of concession awards were subject to prior publication of a concession notice (notably 92 % of notices). Detailed data used to produce this Figure, as well as **Figure *11*** (number of award notices), are provided in the Annex (Table 5 and Table 8).

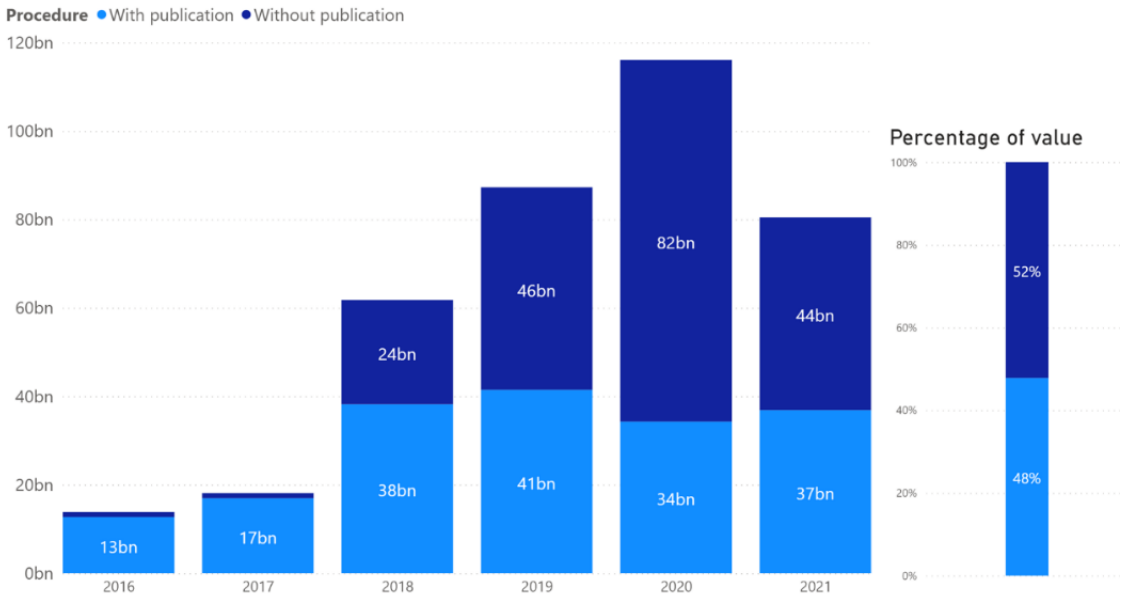
Figure 10: Concession award notices by procedure type and year [number, %]



Source: In-house analysis based on data from the EU Official Journal/Tenders Electronic Daily for 2016-2021

Figure 11 below however indicates that the value of concessions awarded without prior publication of a concession notice was much more significant (52 %) than their share in the number of notices. Concessions with the larger values were awarded through procedures without prior publication of a concession notice, hence without a call for competition.

Figure 11: Concession award notices by procedure type and year [value in billion EUR, %]

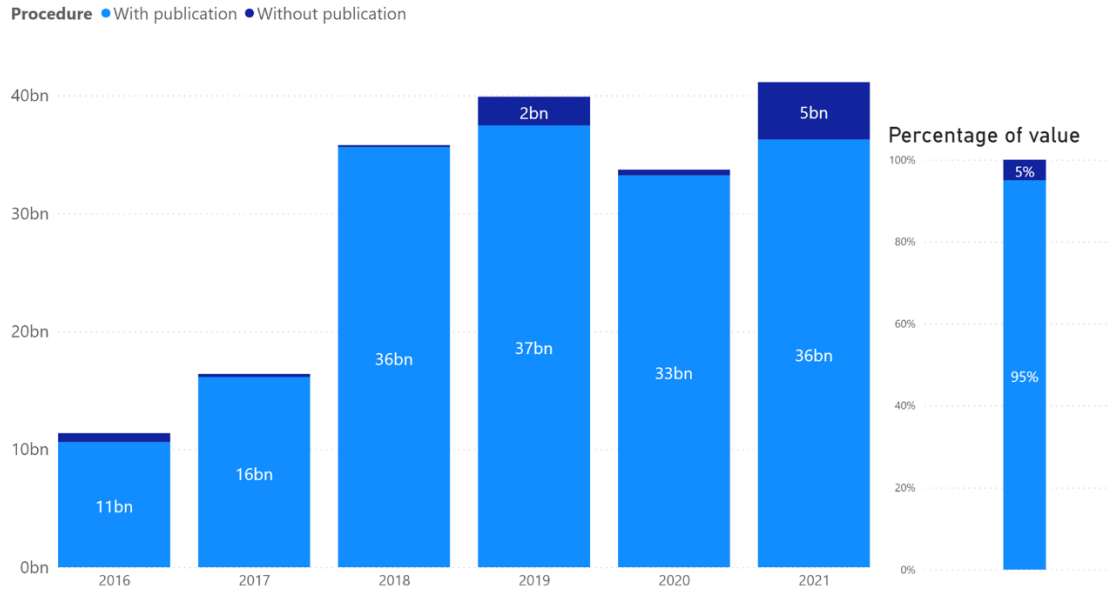


Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data for 2016-2021

When looking into detailed data (see Annex), it appears that an important share of these awards without prior publication of a contract notice occurred in the public utilities sector, in particular in electricity distribution (Common Procurement Vocabulary division 653), which is a market with many features of a natural monopoly and hence may be characterised by the absence of competition due to technical reasons or the existence of exclusive rights.

Removing public utilities from the overall value figures results in an increased share of concession procedures subject to a complete publication cycle (a prior concession notice and an award notice) to around 95 %, see below in Figure 12. It nevertheless also results in a decrease in the overall value of contracts (EUR 178 billion compared with an initial estimate of EUR 377.5 billion).

Figure 12: Concession award notices by procedure type and year- excluding public utilities sector [value in billion EUR, %]



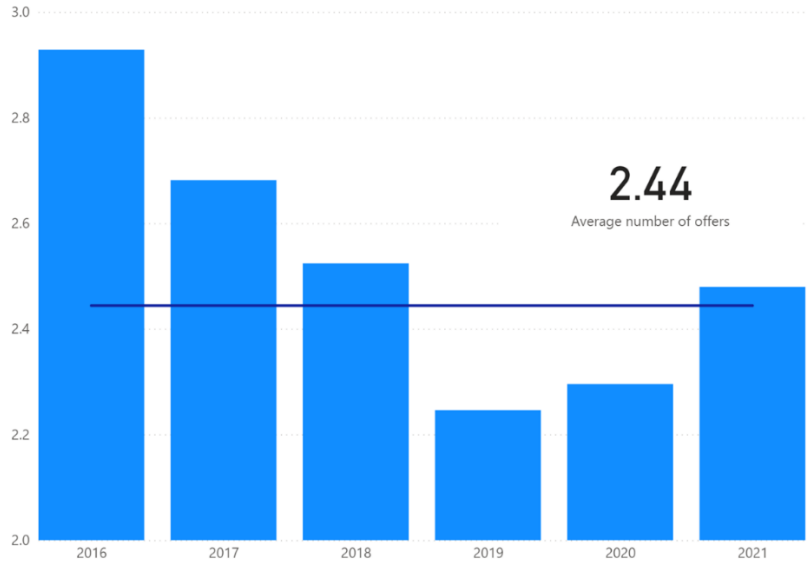
Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data for 2016-2021, EU-27 and EEA

To conclude, despite frequent awards of concessions without a call for competition in the electricity supply sector, the market remains characterised by very high percentages of concessions which have been subject to prior publication of a call for competition. The situation appears to have improved since 2017, with a continuing upward trend in the number of concessions with prior publication of a concession notice.

Number of tender offers

The number of tender offers submitted provides an indication of the extent to which the Concessions Directive has had an impact on the access of potential bidders to the concessions market. The data on the average number of tender offers per concession award notice, provided in **Figure *13***, does not seem to indicate a clear conclusion about the extent to which the number of competitive bidders has increased over time. **Figure *13*** shows a changing trend with an initial decrease, followed by a return to the average level of 2.44 of offers per concession award notice. A comparison with the findings of London Economics Europe and Spark Legal (2021) seems to confirm this conclusion, as that study concludes that the average number of bids received across all awarded concessions was 2.9 in the pre-Directive period and 2.7 in the post-Directive period.

Figure 13: Average number of offers per concession award notice, by year [mean]



Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data for 2016-2021, EU-27 and EEA

The above result is however to some extent influenced by the contracts awarded in the public utilities sector where (as previously indicated) awards without a call for participation in tenders occur more frequently due to the existence of exclusive rights or due to technical reasons. If this sector is removed from the data sample, the average number of tender offers submitted would slightly increase to 2.54, as well as the overall distribution across years (see Table 7 in Annex).

SME participation in concession awards

The Concessions Directive also aims at promoting the participation of SMEs in the concession market. Because concession contracts are often awarded to multiple companies, the group of winning contractors may consist of SMEs or a mix of SMEs and larger firms.

As recognised in the SME Strategy for a sustainable and digital Europe[63], public procurement provides for untapped opportunities within the single market for SMEs, including start-ups. However, it is also recognised that "*SMEs find it hard to successfully compete in public tenders"*. On the one hand, the public sector is relatively risk-averse, and frequently lacks the skill set to procure innovation. On the other hand, many SMEs find public tendering complex or unsuitable for them It can be assumed that the same challenges characterise the administrative process leading to the award of concessions contracts, as they form part of the widely defined public procurement market. During the Stakeholders' event, participants have explained that the transfer of operating risk to the concessionaire could be a deterrent to SMEs participation in concession calls for competition, in particular in view of the fact that high value concessions imply an upfront

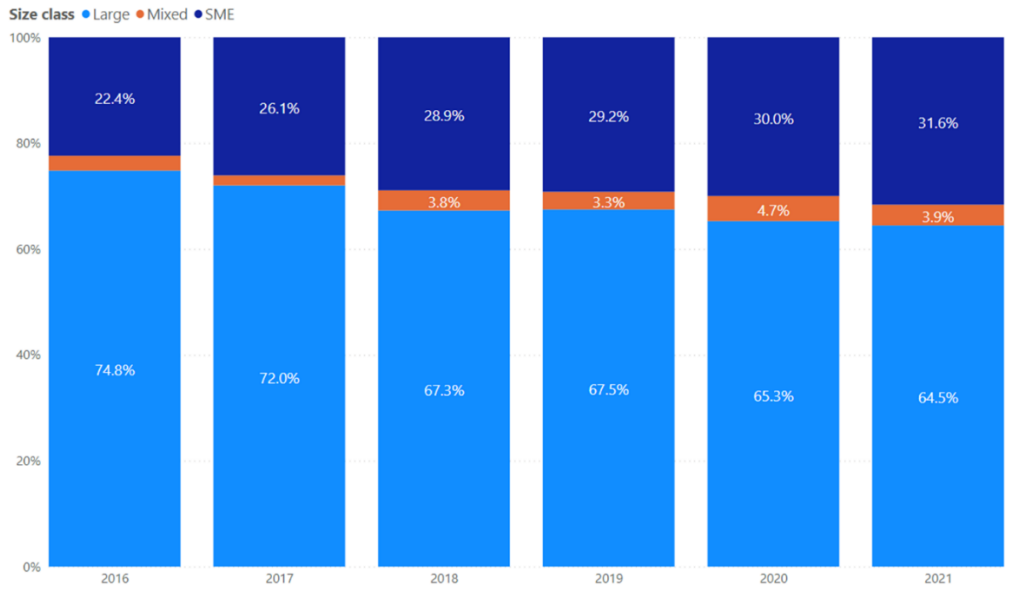
63 Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of Regions: An SME Strategy for a sustainable and digital Europe, COM (2020)103, 10.3.2020.

investment from the concessionaire and SMEs may not have the necessary financial capacity for such investment.

A study covering the years 2011 to 2017[64] estimates that 61 % of the total number of public contracts above EU thresholds were awarded to SMEs. However, these contacts account only for only 33 % of the total contract value in period analysed. The SME share in awarded concessions is nonetheless much lower than their success rate in the overall public procurement market.

The participation of SME can be also tracked using the information contained in the standard forms announced via Tenders Electronic Daily[65]. The data presented below refers to the winning concessionaire type per concession award notice. If a particular concession award notice contained more than one award, and only some of the concessions were awarded to an SME then the entire concession award notice is classified as "mixed".

Figure 14: Share of concession award notices in 2016-2021, by contractor size class and year [% of number]



Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data for 2016-2021, EU-27 and EEA

The share of concessions awarded to SMEs has increased over the investigated period in terms of the number of concession award notices, from 22.4% in 2016 to 31.6% in 2021.

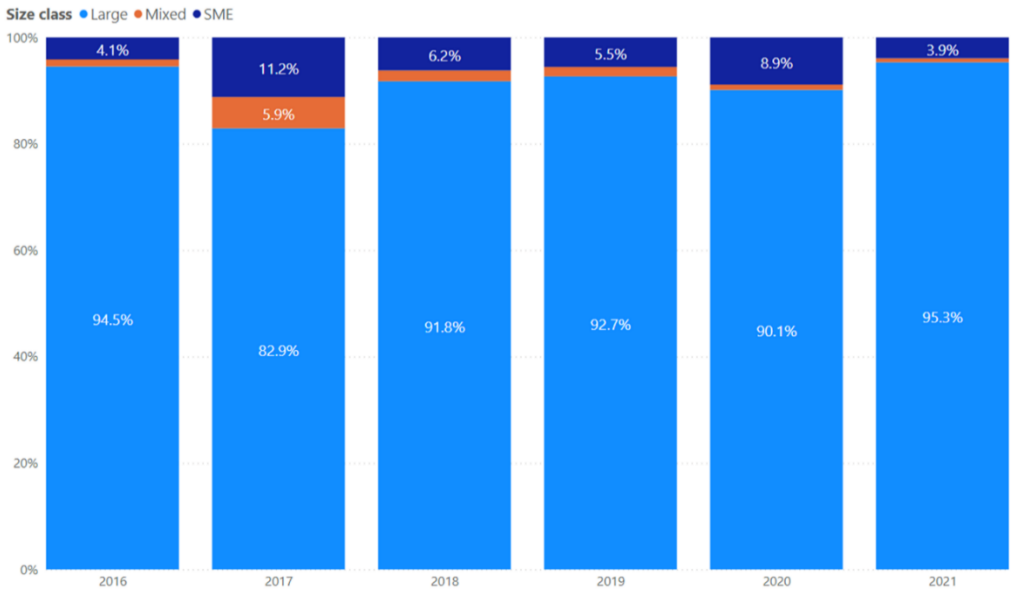
64 De Bas, P., Hausemer, P., Kruger, T., Rabuel, L., de Vet, J.M., Vincze, M.(2019), page 37.

65 The interpretation of the data presented in this section should nonetheless be made with a disclaimer that the information is based on self-declarations of the contracting authorities, as provided in the standard forms. It is also important to clarify that data used to produce the Figure is different from what is presented in London Economics Europe and Spark Legal (2021) study (e.g. Figure 39, page 88 in the external source). This is due to the fact that the current analysis focuses only of standard forms dedicated to the Concessions Directive, whereas the external study also included concessions awarded using other public procurement Directives, such as Directive 2014/24/EC. Secondly, the reference year in Figure 4 is the year of publication in EU Official Journal/Tenders Electronic Daily, while London Economics Europe and Spark Legal (2021) based their visualisation on the concession award date.

On average, between 2016 and 2021, SMEs were indicated as winners in 29.2% of concession award notices (1 266 contract award notices), whereas contracts with concessionaires of mixed sizes constituted 3.6 % or 157 notices. The remaining concessions, namely 67.2% were concluded with large enterprises (2 912).

Even if the trend is positive, SMEs do not account for a similarly important share of contracts won in terms of their value. **Figure *15*** below visualises the same data grouped by winners' size classes but adjusted by taking into account the concessions value. It confirms that SMEs were principally successful in low value awards (SMEs shares varied between 11.2 % in 2017 to 3.9 % in 2021). Although large enterprises won only two in three concessions awarded in the investigated period, such contracts accounted for nearly 92 % of the market in terms of value.

Figure 15: Share of concession award notices in 2016-2021, by contractor size class and year [% of value]



Source: In-house analysis based on EU Official Journal/Tenders Electronic Daily data for 2016-2021, EU-27 and EEA

Detailed data used to produce the above two Figures are available in Annex (Table 9).

The results can be explained by the fact that concessions usually refer to high value contracts, whereas the above study concludes that the larger the contract value, the less likely an SME is able to win a contract. The value of a public contract for which companies compete is the most important explanatory factor for the probability of SMEs (and individually for micro-, small- and medium-sized enterprises) to win. SMEs themselves see large contract values as the key barrier for them to participate[66]. Stakeholders mentioned during the Stakeholders' Event that, as opposed to a public contract, concessions require significant up-front investment and the associated risk, therefore SMEs are rather reluctant to participate in calls for participation in concessions.

[66] De Bas, P., Hausemer, P., Kruger, T., Rabuel, L., de Vet, J.M., Vincze, M.(2019), page 54.

Finally, it should be noted that even in the broader public procurement market the number or value of concessions awarded to SMEs still constitute a smaller proportion than the overall importance of SMEs in the economy. This suggests that further ways of encouraging SMEs to participate in concession award procedures could be explored (e.g. expanding their role as subcontractors, easy-to-understand guidelines wider use of eProcurement that facilitates access to business opportunities, preferential purchasing schemes, etc.).

Cross-border and Foreign Participation in the EU concessions market

Access to EU concessions markets is open to EU based companies but also to non-EU based companies. The Agreement on Government Procurement and the Free Trade Agreements provide for legal clarity for non-EU operators. The World Trade Organisation Agreement on Government Procurement is the main international agreement relating to public procurement[67]. It aims at ensuring fair, transparent and non-discriminatory conditions of competition for purchases of goods, services and construction services by the public entities covered by the Agreement. While the Agreement on Government Procurement covers works concessions contracts[68], the EU has restricted that access to concession contracts awarded by central government entities[69] or by sub-central government entities[70] but not when awarded by utilities[71]. Furthermore, the EU has committed works concessions under national treatment regime vis-a-vis eight GPA Parties (Iceland, Liechtenstein, Norway, Aruba, Switzerland, Montenegro and the United Kingdom (above 5 000 000 SDR) and Korea (above 15 000 000 SDR). The following EU Bilateral Free Trade Agreements: EU/ Andean Community, CETA (Canada), EU Chile, and EU Singapore also cover works concessions.

Services concessions are covered neither by the Government Procurement Agreement nor by the government procurement chapters in any bilateral trade agreement[72].There are various ways through which public procurement legislation can influence international competition and trade. It usually forms part of market entry rules defining the way in which foreign partners can compete on the local market. For example, in certain jurisdictions bidding for tender procedures may require local presence or participation in an international trade agreement. In the EU, local presence is not a prerequisite for participation in public procurement, as the foreign access to the internal market is in principle open to foreign bidders.

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67 At present, Government Procurement Agreement has 21 parties, which together cover 48 WTO Members (the EU and its 27 member States are counting as one Party). This includes six new Parties whose respective accessions became effective after the entry into force of the Government Procurement Agreement 2012.

68 It covers "procurement by any contractual means", cf. Art. II.2 (b) of the GPA. Note, however, that the GPA can only apply to situations where the contracting authority actually acquires property of the construction. A works concession contract under which the ownership in the work remains with the concessionaire would not fall within the scope of government procurement.

69 Annexe 1 of the EU schedule European Union (wto.org).

70 Annex 2 of the EU schedule European Union (wto.org).

71 Annex 3 entities European Union (wto.org). Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba, Switzerland, Montenegro and the United Kingdom (above 5,000,000 Special Drawing Rights (SDR)) and for Korea (above 15,000,000 SDR).

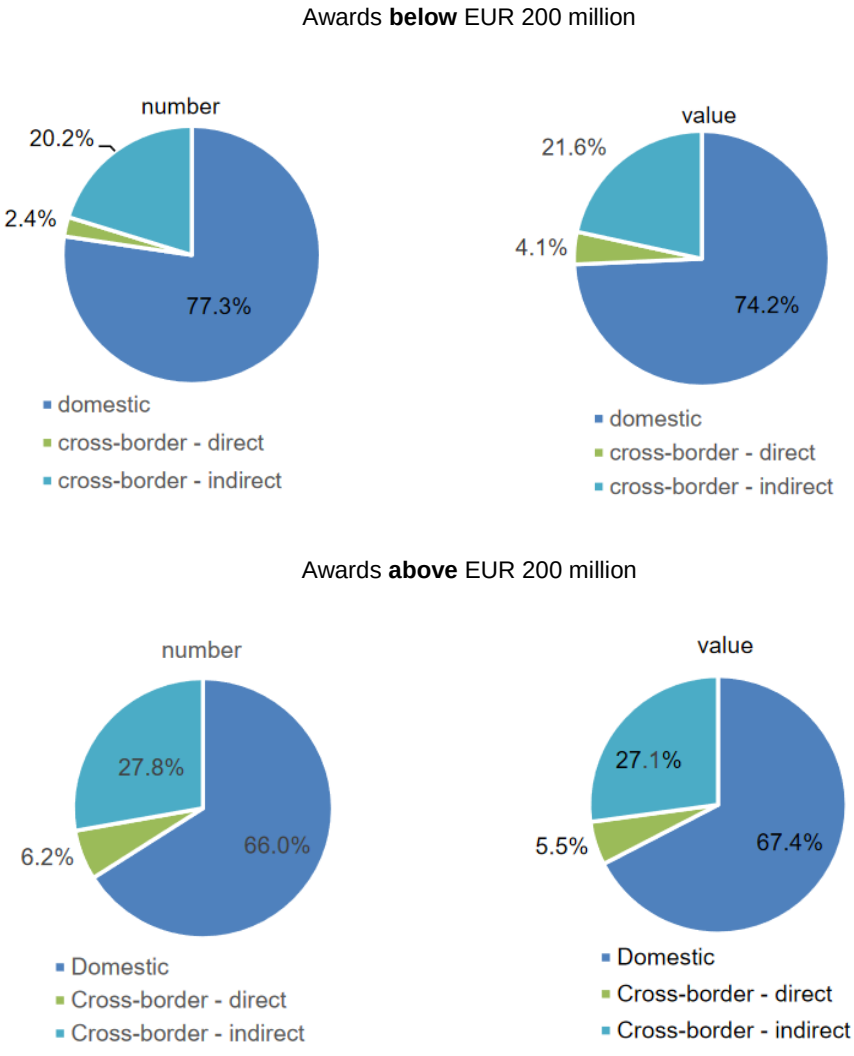
72 While government procurement is the acquisition by a state body of goods and/or services, a services concession typically is a concession that allows the concession holder to offer services (e.g. a public transport service) to the broader public. It is then not the state who actually purchases those services.

The cross-border public procurement activities of companies usually distinguish between **direct** and **indirect cross-border procurement,** which can be described as follows:

- firms bid from their home market and win contracts for invitations to tender launched in another Member State (**direct cross-border procurement**); or
- firms bid for contracts through its local subsidiaries and win contracts for invitations to tender launched by authorities of a country different from the country where the firm has its headquarters (**indirect cross-border procurement**).

A recent study by Prometeia, BIP (2021) provides certain estimates of cross-border activity in procurement covered by all public procurement directives. The results are presented in **Figure *16*** below, separately for awards with values below and above EUR 200 million (hence in line with the methodology adopted in the quoted study).

Figure 16: Domestic or cross-border awards by type of procurement in 2016-2019 [percentage on total number and value]



Source: Prometeia, BIP, Economics for Policy - a knowledge Centre of Nova SBE Lisboa (2021), pages 18 and 20.

Cross-border activity concerns around 20 to 25 percent of contracts awarded above EU thresholds (all public procurement Directives combined). The shares are slightly higher for awards exceeding EUR 200 million, confirming that high value contracts are usually more attractive to foreign bidders and hence characterised by higher propensity to cross-border wins, up to 32.6 %, for high value contracts.

The Prometeia, BIP (2021) study also provides exact estimates for the cross-border procurement allocated to each of the procurement Directives, allowing a comparison between concessions and other public contracts.

Table 1: Number and value of awards and cross-border procurement by Directive, 2016-2019 average [%]

*Awards **below** EUR 200 million*

Directive	Distribution of total awards		% share of direct cross-border		% share of indirect cross-border	
	number	value	number	value	number	value
Classical	91.6%	79.9%	2.2%	3.4%	20.3%	21.2%
Utilities	7.5%	15.0%	4.2%	7.3%	20.6%	25.6%
Concessions	0.3%	3.0%	2.4%	1.6%	15.5%	14.1%
Defence	0.6%	2.0%	8.3%	11.2%	15.4%	18.1%

*Awards **above** EUR 200 million*

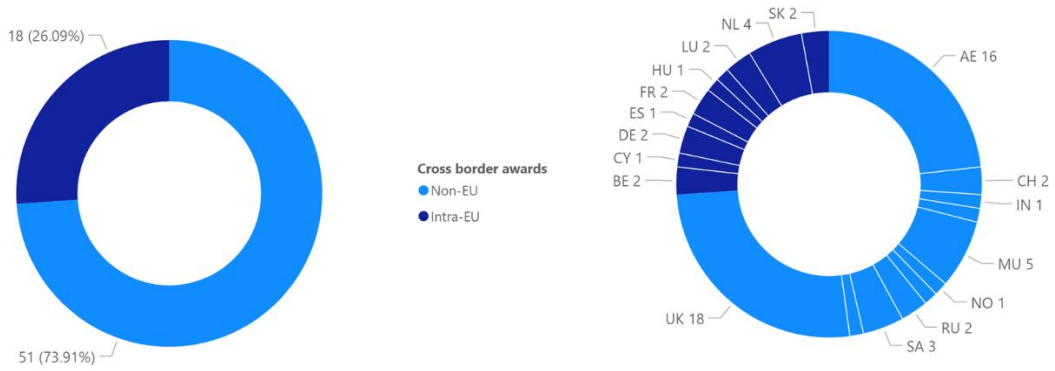
Directive	Distribution of total awards		% share of direct cross-border		% share of indirect cross-border	
	number	value	number	value	number	value
Classical	67.7%	60.8%	5.3%	4.2%	30.6%	32.5%
Concessions	13.1%	18.9%	3.4%	3.9%	8.5%	5.2%
Utilities	15.1%	16.3%	14.7%	13.5%	36.8%	35.7%
Defence	4.0%	4.0%	0.0%	0.0%	11.1%	16.8%

Source: Prometeia, BIP, Economics for Policy - a knowledge Centre of Nova SBE Lisboa (2021), Table 2-13 on page 66 and Table 2-28 on page 78.

On the basis of the Prometeia, BIP (2021) study, high value concession contracts account for a significant share of the total number of high value public contracts (18.9 % of their total value), compared to only 3 % among the low value awards. Among the high value concession contracts, only 8 % (in value terms) of contracts were awarded on a cross-border basis, as opposed to 37 %and 49 % for the other two public procurement Directive. Despite the economic significance, the share of direct cross-border awards under the Concession Directive is rather low, indicating a low penetration rate into domestic concessions markets. This could partly be explained by the relative importance of service concessions in the overall amount, which as such are considered in the literature as less tradable than goods and works.

In order to assess the penetration rate of non-European companies, the award notices from the Tender Electronic Daily database have been analysed for the same period. Only 69 contracts have been awarded directly to concessionaires located in a country different from the country of the contracting authority, among which 51 were awarded to operators established outside the EU.

Figure 17: Direct cross-border awards by the location of the winning company (intra-EU and non-EU), left chart - shares [number, %], right chart – overview by countries [number]



Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

As shown in **Figure *17*** above, when non-EU concessionaires are compared with winners located in other Member States, this proportion is about one to three. It shall be noted that in the above overview, the EEA countries are classified as third countries.

Concession contracts awarded directly to non-EU operators mainly concern administrative or diplomatic services abroad, usually launched by the Ministries of Foreign Affairs for their local representations. Examples of such concessions include:

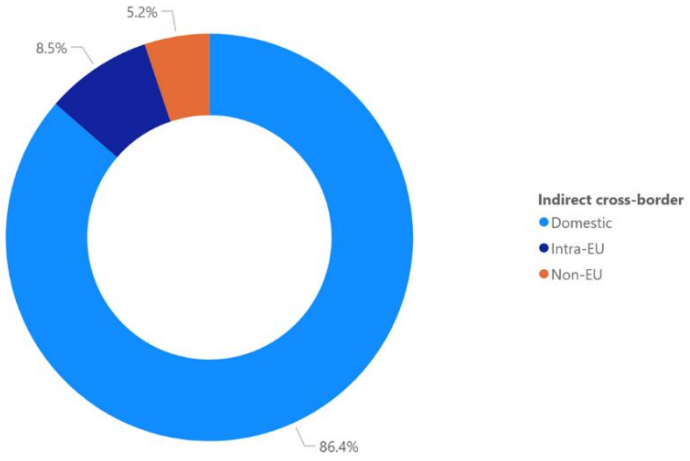
- the establishment and operation of a visa centre abroad;
- the issuing of digital IDs for residents;
- the support for SMEs and intermediate-sized companies and their local subsidiaries abroad within the framework of the public export service;
- organisation of a professional fairs during an international summit.

As for the number of contracts awarded to firms located in the United Arab Emirates (AE) and Mauritius (MU), all these awards (except one) were awarded to concessionaires from the same corporate group. These firms specialise in technology services for governments and diplomatic missions, such as the reception of applications for visas, permits and travel documents, as well as performance of administrative and non-judgmental tasks related to such services for governments. Member States, which awarded concessions to firms of these corporate groups concerning the various diplomatic services to citizens include the Czechia, Denmark, Estonia, Germany and Slovakia.

To complement the above insight, and obtain a greater granularity in the results, an assessment of the ownership structure and, in particular, the identification of the Global

Ultimate Owner[73] of the firm winning concession contracts was carried out on the basis of data sought in Orbis BvD. This was subsequently used to identify winning companies, which were owned by firms located in countries different from those of the contracting authority (i.e. estimate the indirect cross-border procurement). Around 86 % of winning companies from the Tenders Electronic Daily were successfully matched with Orbis BvD. Still, even when matched, some of the firms did not have complete information about their Global Ultimate Owners. In view of the above, for the purpose of this report, in those cases where the information on Global Ultimate Owner is missing (because no such information is available in Orbis BvD or the firm was not found in this database), the winning firm is assumed to be the Global Ultimate Owner and its country of location has been used in the indirect cross-border overview. The results of the above process are presented in the next graph.

Figure 18: Indirect cross border awards by location of the global ultimate owner of the winning company [number,%]



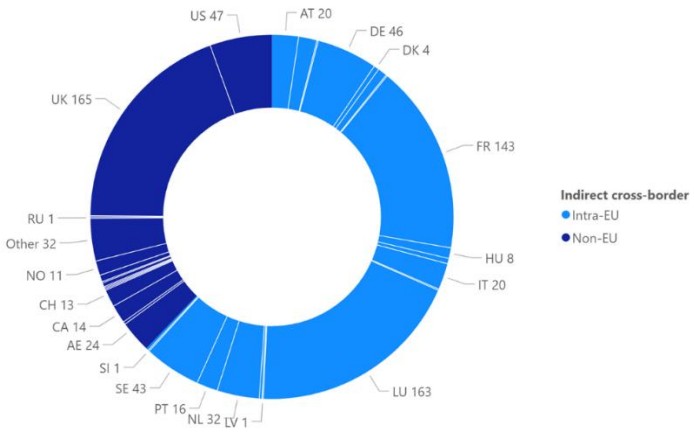
Source: In-house analysis based on the Official Journal/Tender Electronics Daily data for 2016-2021, EU-27 and EEA

During the 2016 to 2021 period, roughly 13.7 % of concession contacts were awarded to local subsidiaries of companies located in countries different from the country of the contracting authority. The above results relate to the most recent years but are broadly in line with the earlier presented estimates of Prometeia (2021) and presented above.

As evidenced by Figure 19 below the share of winning firms owned by a Global Ultimate Owner established in another EU country was around 8.5 %, compared to non-EU Global Ultimate Owners, which accounted for 5.2 % of all awarded concessions. More details on the geographic location of the ultimate owners of companies winning concession contracts in the EU are provided below.

[73] The independent shareholder with the highest direct or total percentage of ownership. The geographical location allows distinguishing between the Global Ultimate Owner from the Domestic Ultimate Owner. The minimum percentage of control in the path from a subject company to its Ultimate Owner chosen for the analysis presented in this document was 50.01 %.

Figure 19: Indirect cross-border awards by the location of the global ultimate owner of the winning company (intra-EU and non-EU) – overview by countries [number]

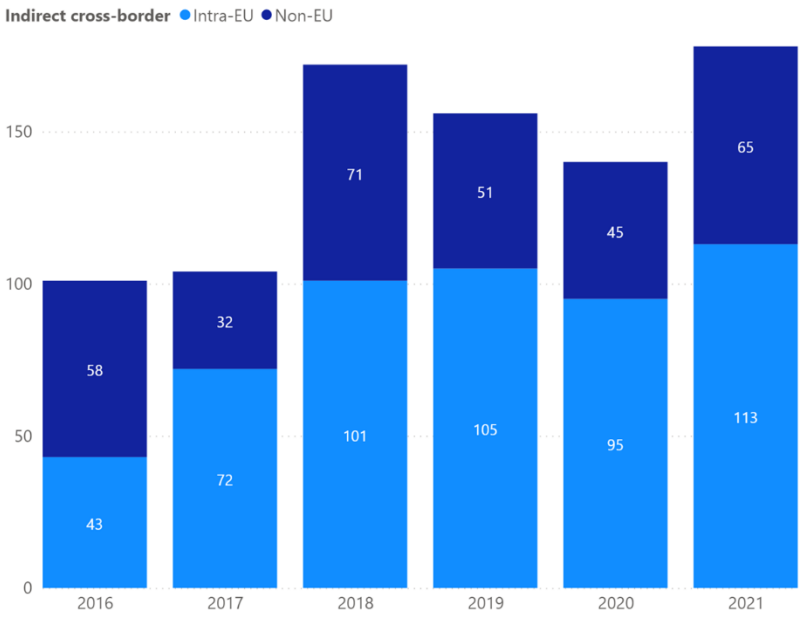


Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016-2021, EU-27 and EEA

As presented in Figure 19, firms with headquarters in Luxemburg were among the most frequent winners of indirect cross-border concession contracts, followed by France, Germany and Sweden. For non-EU countries, 165 concession contracts were awarded to local subsidiaries of United Kingdom-based companies and 47 to corporations headquartered in the United States.

As shown in Figure 20 below, the number of concessions awarded to foreign subsidiaries of non-EU firms has slightly increased over the recent years. However, given the short period of time for which data are available following 18 April 2016, it seems premature to draw a sustainable trend, especially given the order of magnitude of the overall figures.

Figure 20: Indirect cross-border awards by the location of the global ultimate owner of the winning company (intra-EU and non-EU) – overview by years [number]



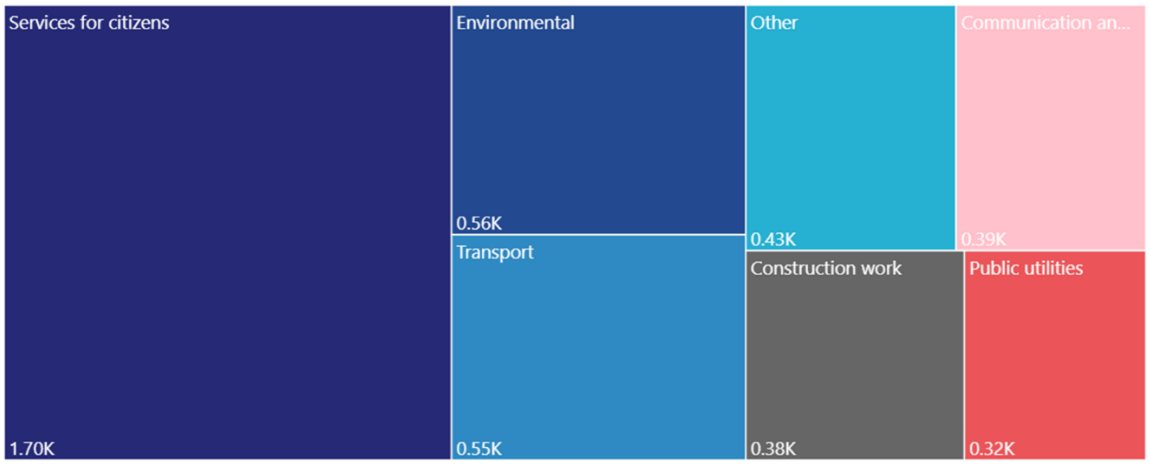
Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016-2021, EU-27 and EEA.

6. SECTORAL OVERVIEW – KEY SECTORS COVERED

The following Chapter presents an overview of the sectors in which the Concession Directive has been applied. It focuses on selected key sectors, which were chosen either because of their economic significance, or specific implementation patterns that were judged worth highlighting in this report.

Observations published in Tenders Electronic Daily during the 2016 to 2021 period are grouped into seven high-level clusters, each encompassing several Common Procurement Vocabulary codes[74] of different levels[75]. The following high-level groups are used in the sectorial overview in this staff working document: "Services for citizens", "Public utilities", "Environmental services or works", "Construction work", "Transport", "Communication and IT services", and "Other". The last group captures all remaining Common Procurement Vocabulary codes, not included in the other sectors. Based on the above taxonomy, **Figure *21*** below shows that the largest number of concession contracts awarded in 2016 to 2021 relates to the broadly understood "Services for citizens" (1 699 contract award notices). Other sectors with an important number of concessions awarded are environmental protection (564 contract award notices) and "Transport" (553 contract award notices).

Figure 21: Concession award notices by high-level sectors [number]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27 and EEA

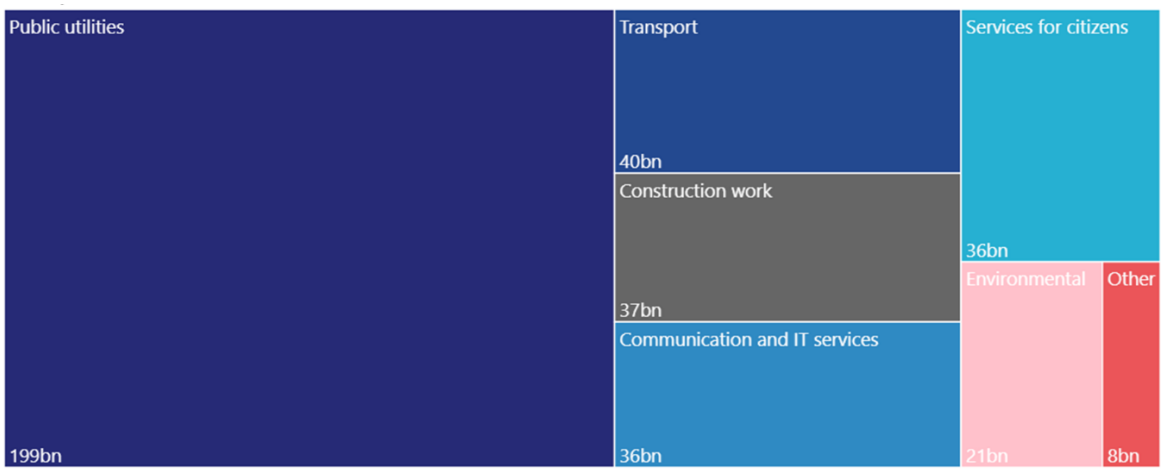
When expressed in value, the concessions awarded in the "Public utilities" sector account for the largest share of contracts awarded, with nearly EUR 200 billion (see: **Figure *22***

[74] A detailed list of Common Procurement Vocabulary codes allocated to each of the sectorial groupings is provided in the Annex (Table 10).

[75] The main Common Procurement Vocabulary is based on a tree structure comprising codes of up to nine digits associated with a wording that describes the supplies, works or services forming the subject of the contract. The numerical code consists of 8 digits, subdivided as follows: the first two digits identify the divisions (XX000000-Y), the first three digits identify the groups (XXX00000-Y), the first four digits identify the classes (XXXX0000-Y), the first five digits identify the categories (XXXXX000-Y).

below). As already mentioned in section 5.3., when looking into details of data collected for this sector, the most important contribution comes from "Electricity distribution" contracts that were worth around EUR 175 billion.

Figure 22: Concession award notices by high-level sectors [value in billion EUR]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27 and EEA

The "Public utilities" sector is followed by "Transport" and "Construction work" with EUR 40.48 billion spent and EUR 36.72 billion spent, respectively.

Taking into account the above distributions by number and value, the following sectors have been chosen for a more detailed analysis:

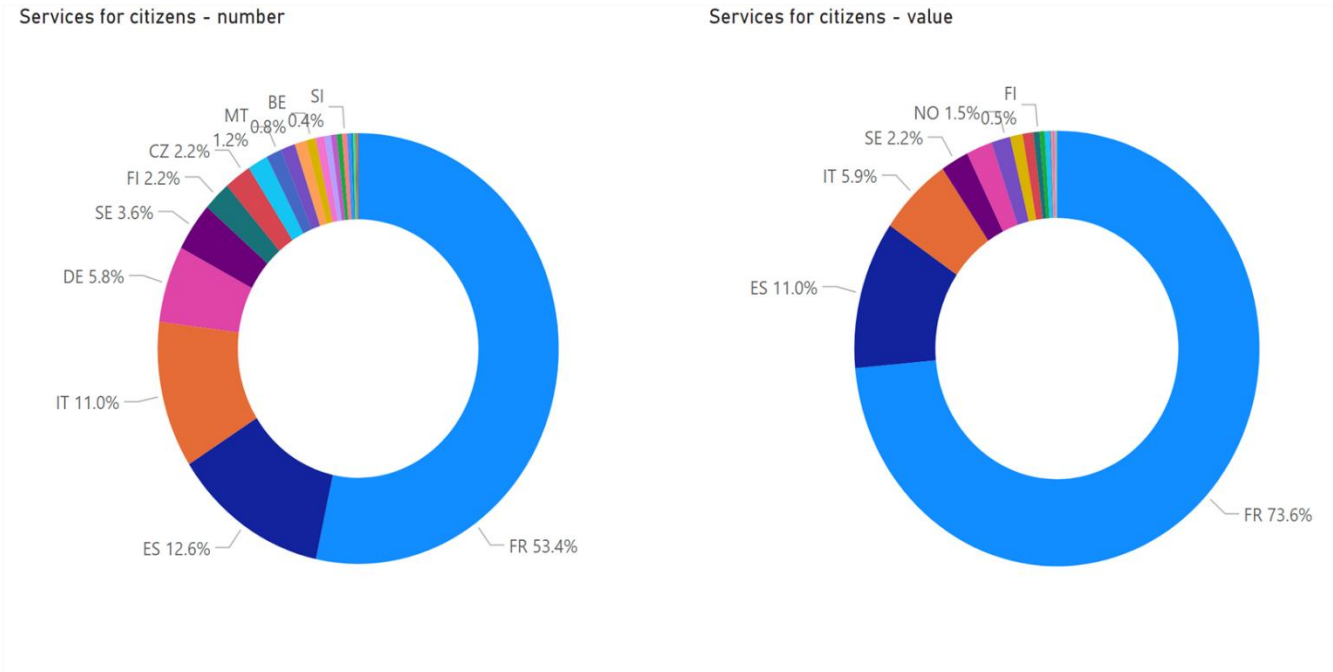
- "Services for citizens" with a particular focus on recreation, culture, sport and other local services;
- "Public services" with a particular focus on energy generation and supply;
- "Environmental services or works."

Recreation, culture, sport and other local services

The "Services for citizens" sector encompasses a broad range of activities of public administrations such as: restaurant and canteen services, recreational, cultural and sporting services, health and social work services, administration, defence, education and training services, fire-fighting, police and other security services.

Figure *23* below shows that more than half of contract award notices published in this area in 2016 to 2021 originate from France (53 %), followed by Spain (12.6 %) and Italy (11 %). In terms of value of concessions, the situation is similar: France (73 %) is followed by Spain (11 %) and Italy (6 %).

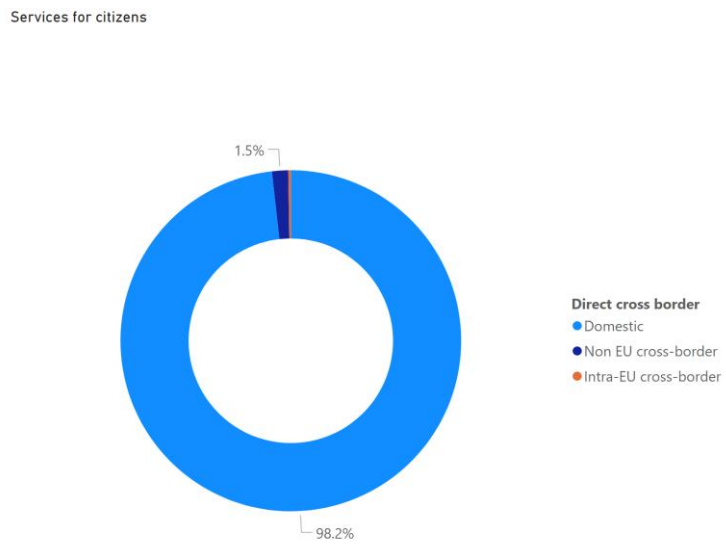
Figure 23: Services for citizens [number; value]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016-2021, EU-27

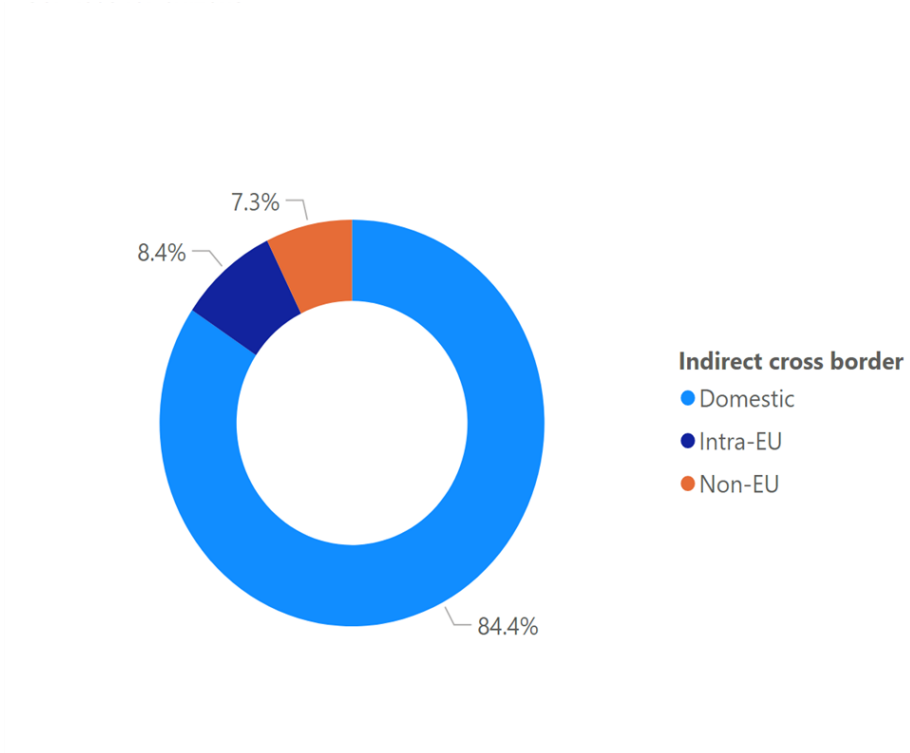
In terms of direct cross-border propensity, the sector is dominated by domestic awards (98 %), as shown in **Figure *24*** below. Some cross-border awards take place, however indirectly (15.7 %), with an equal share of contracts awarded intra-EU (8.4 %) and non-EU (7.6 %).

Figure 24: Services for citizens, direct cross border [number]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27.

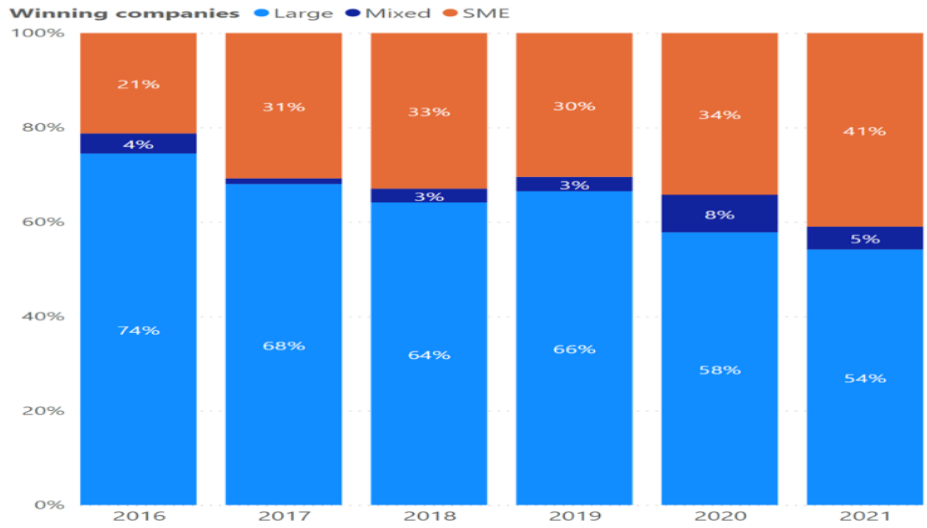
Figure 25: Services for citizens, indirect cross-border [number]



Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27

When looking at the size of companies winning concession contracts in this sector, one can notice an increase in the share of SMEs since 2016, which may be associated with the introduction of the Concessions Directive. Yet the share of SMEs is lower than 60% which is the estimated share of SMEs winning in the overall procurement market.

Figure 26: Services for citizens- SMEs [number]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016-2021, EU-27.

In this sector, the sub-sector using most concessions is "Hotel, Restaurants and Retail Trade Services", within which most awards concern catering and canteen services and "recreational, cultural and sporting services". As evidence in the London Economics Europe and Spark Legal (2021) study, the yearly average number of concessions increase significantly relative to the pre-Concessions Directive situation, probably due to the fact that services concessions were not covered by specific EU legislation prior to 2016.

Figure 27: Concession award notices related to recreational, culture and sporting services –focus on CPV division 55 [number]

Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016-2021, EU-27 and EEA

Case study - Public service delegation for school and extracurricular catering for the City of Raincy (France)

- *Description*

In November 2021, the City of Raincy awarded a tender for the management by way of public service delegation of the school and extracurricular catering for a duration of 60 months. The catering service operates on the principle of cold connection, the sites of consumption being equipped to receive, restore or maintain temperature, and serve meals made in advance and delivered from a single production site with European health approval or a derogation from the approval.

- *Total value of procurement (excluding VAT)*

Lowest offer: 6 754 808.50 EUR / Highest offer: 8 131 337.95 EUR taken into consideration

- *Information on value of the concession and main financing terms (excluding VAT)*

Initial estimated total value of the contract/lot/concession: 6 500 000.00 EUR

Total value of the concession/lot: 6 754 808.50 EUR

- *Award criteria*

Concession is awarded on the basis of the criteria described below:

- Price
- Quality of food supply
- Quality of the support offer

Figure 28: Concession award notices related to recreational, culture and sporting services –focus on Common Procurement Vocabulary division 92 [number]

Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27 and EEA.

"Public services" - Energy generation and supply

This sector includes concessions relating to electricity, oil and gas industry and public utilities. This is the largest sector in terms of total value of the concessions awarded as shown in **Figure *22*** above.

France accounted for three quarters of all concession award notices published in the public utilities sector (244 out of 317) in 2016-2021. Germany followed suit with 13 % of contract award notices published in the same period.

Case study: Germany – Wind energy concessions with zero subsidy

An example of good practices, in the application of the concession contract form, can be found in the wind generated electricity.

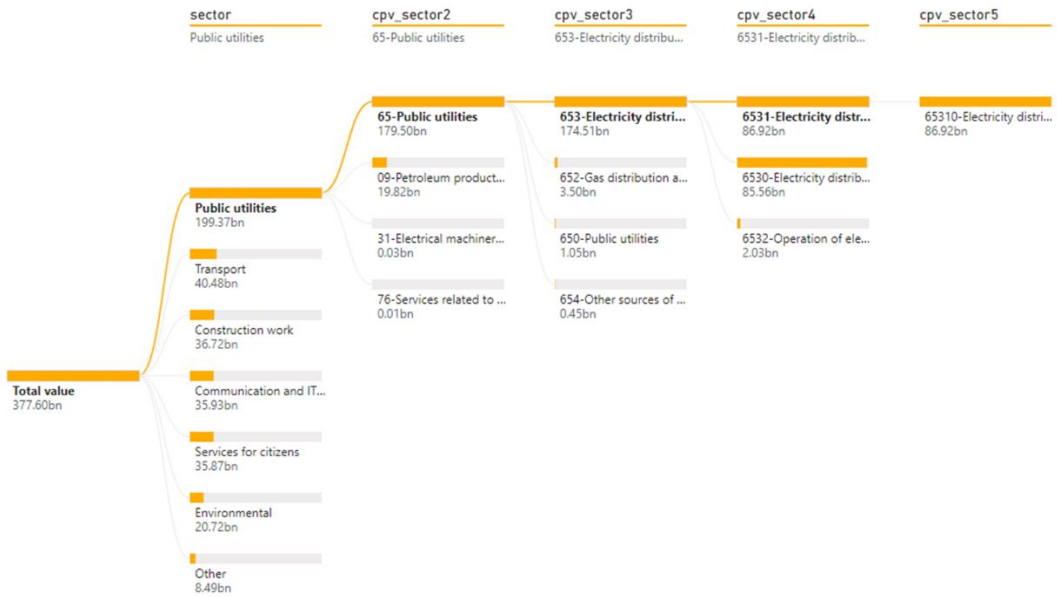
In 2017, the German authorities awarded two companies, namely EnBW and Ørsted, with contracts for four offshore wind projects totalling 1.49 GW, which notably resulted in successful bids to develop 1.38 GW of the amount without any form of state subsidy support. It became the first offshore wind power developers to acquire concessions at unsubsidised prices, bidding prices of zero euros per MWh to win projects in German waters, which also constitutes a landmark for the industry.

The Danish company Ørsted explained its possibility to submit a zero-subsidy bid was due to different factors, namely:

- the timeframe allowing for larger wind turbines to be deployed;
- the exclusion of grid connection cists from the bidding process;
- the possibility to extend operational lifetime of the wind farm for 30 years.

The German example is an illustration of the fact that authorities do well in considering wider risks for the success of concession projects than those strictly linked to market risk or the concessionaire's performance risk. In the case of offshore wind, there is significant risk in relation to the connection to the electricity grid. This risk is significant for the concessionaires' revenues but is linked to grid infrastructure aspects that are wholly outside their control.

Figure 29: Concession award notices related to public utilities - focus on Common Procurement Vocabulary group 653 (Electricity distribution) [value in billion EUR]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27 and EEA

Out of the public utilities, the vast majority of concessions (97 %), in terms of value are awarded for electricity distribution and related services (Common Procurement Vocabulary group 653).

Due to the specificities of the electricity distribution market (legal monopoly), the majority of concessions are awarded through procedures without prior publication of a contract notice justified by the existence of special or exclusive right of the incumbent over the exploitation of the distribution network.

As shown in the analysis[76] of all contract values performed by London Economics Europe and Spark Legal (2021) between 2016 and 2019, eight out of the top ten largest concession contracts in terms of value are in France and concern development and operation of electricity distribution networks and supply and are awarded in procedures without prior publication of a contract notice.

Case study: Italy – Concession for design and execution of works and upgrading of public lighting systems

The project consisted in design and execution of works and upgrading of public lighting systems together with management, operation, maintenance and supply of electricity for 21 municipalities in Italy.

The award criteria were: the quality of the project, the economic offer and the quality of the management/operation.

This project is an example of a concession in the electricity sector, where typically the tenders are carried out without prior publication of a notice due to existence of special or exclusive rights. In this case however, in the absence of such exclusive rights, the concession was awarded following an open call for tender, which received three offers and resulted in savings for the contracting entity. The initial total estimated value of the concession was of over EUR 43 million and the concession was awarded for close to EUR 34.million, generating a saving of 20 % of the initial estimated value.

Case study: France – Motorway construction works - Concession of Centre-Europe Atlantique motorway between Sazeret et Digoin

This case study presents a tender for concession for works, operation, maintenance and exploitation of a motorway which attracted a high number of tenderers and resulted in considerable savings for the contracting authority.

The tender required the design, construction, maintenance and exploitation of a two lanes motorway and the adjoining infrastructure of the existing section of RN 79 situated between Grand Champ in Sazeret and Digoin (Saône-et-Loire) with a total length of 89 km. The works had to be realized without interruption of the traffic.

Criteria for the award were: economic and financial robustness, the lowest toll perceived during the entire concession period, the level of service and quality of the maintenance, the technical, environmental and social quality criteria.

Following a selection process based on a call for tenders followed by a negotiation phase, the contracting authority signed the concession contract in March 2020 with the company ALIAE (Autoroute de Liaison Atlantique Europe). The financing of this project, of which the investment cost alone is estimated at EUR 548 million, was fully taken over by the concessionaire, without

[76] London Economics and Spark Legal (2021), page 92.

any public subsidy. The construction has to be finalised in two years, and the duration of the concession is 48 years.

The project is expected to create up to 1 200 jobs, with one third recruited locally and foresees 30 % of subcontracting to be assigned to SMEs.

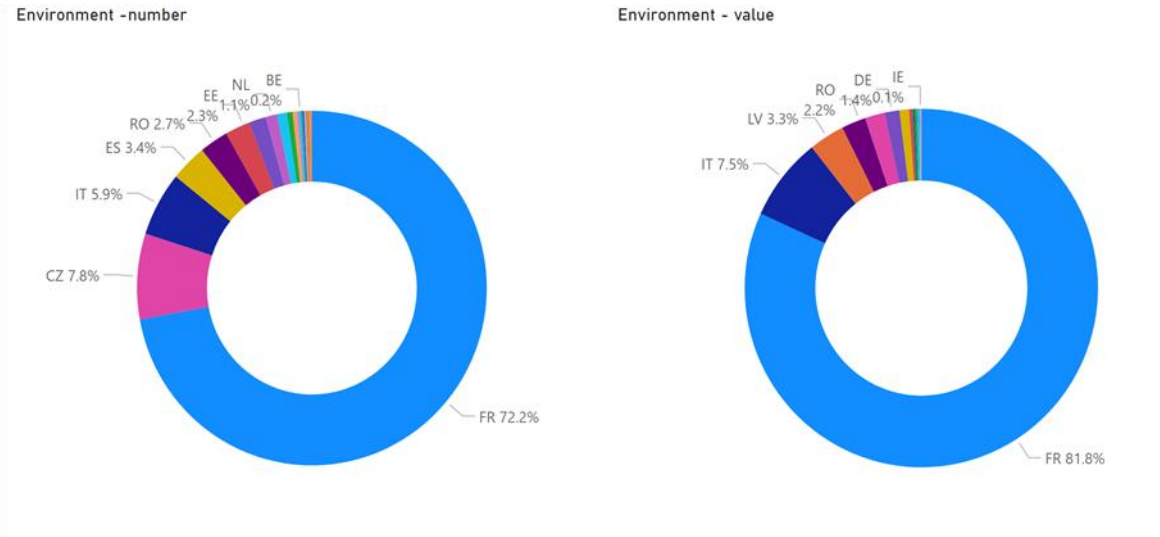
The motorway will benefit from a free-flow toll technology contributing to the fluidification of traffic and reduction of CO2. The reading of the license plate or electronic toll badge by camera will automatically associate the passage with a bank transaction. This technology is already being used in Europe, but it will be used for the first time in France on this project.

The initial total estimated value of the concession was of EUR 5.35 billion and the concession was awarded for EUR 3.95billion, generating thus a saving of more than 25 % of the initial estimated value. The tender generated a lot of interest as the contracting authority received 14 offers, out of which 2 from outside the EU.

Environmental services and works

Figure *30* below shows that more than around 75 % of concessions in this sector between 2016 and 2021, both in terms of number and in terms of value, were awarded by France. Czechia accounts for almost 8 % of the number of concession awards but in terms of value these contracts are below 0.1 % which indicate that contracts are low value concessions. Italy comes in third with almost 6 % of the number of concession awards, which represents 7.5 % in terms of value.

Figure 30: Environment concessions by EU Member State [number; value]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27.

Case study: the Netherlands – Sustainable large scale district collective heating and cooling system

In July 2016, the municipality of Amsterdam published a tender for the design, construction and operation of an Energy Neutral Centre Island which was part of the expansion of the city. The term "energy neutral" signifies that the energy for heating and cooling for houses and additional facilities had to be generated from renewable sources. The choice has been made to supply energy-neutral heat and cold with thermal energy storage in combination with heat pumps. The concessionaire had to design, build, manage, maintain and operate a fully functional heating/cooling facility at its own expense and risk.

The dimensions of the Centre Island comprised of up to 1 500 houses, out of which 30 % were developed by project developers and/or housing corporations, while the remaining 70 % was self-built (individual self-built and collective self-built).

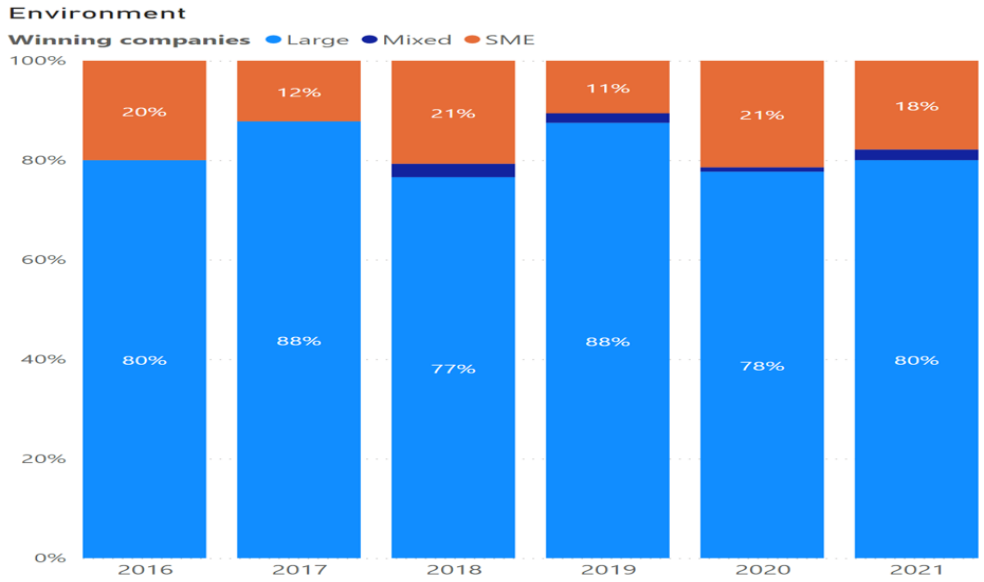
The procedure used was negotiated with competition, and the award criteria was price (70 %) and quality (30 %). Invitation was sent to three tenderers and the concession contract was signed with Eteck in June 2017. The duration of the concession is of 30 years and was considered crucial to ensure a profitable business case.

This project is a successful example of innovative integrated housing and sustainable energy project carried out through a concession contract. The sustainable goal was to achieve housing climate neutrality by phasing out natural gas and promote renewable energy and circular economy.

When looking at the size of companies winning concessions in this sector, it is noted that the sector is clearly dominated by large companies (around 80 % of concessions go to large companies). The share of SME awards is only around 20 % in terms of number of contracts which is considerably lower than their success rate (61 % in terms of number)[77] in the overall public procurement market.

[77] De Bas, P., Hausemer, P., Kruger, T., Rabuel, L., de Vet, J.M., Vincze, M.(2019)

Figure 31: Environment, SMEs winning [number]



Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27

Figure 32: Number of concession award notices related to environmental works and services, in 2016-2021

Source: In-house analysis based on Official Journal/Tender Electronics Daily data for 2016 to 2021, EU-27 and EEA.

Case study: France – Vert-le-Grand refurbishment, operation and management of the waste incineration and treatment centre and related services

This case study presents a concession for works, operation, maintenance, and renewal of an incineration and waste treatment centre based in Vert-le-Grand. The project notably includes an incineration centre and a sorting centre.

More precisely, the tender specifications required: (i) to make the necessary investments to increase the performance of the existing incineration centre and make it more innovative with a reduction in its environmental impacts and compliance with regulations, and (ii) to increase the capacity of the sorting centre with a view to reaching a capacity of 70 000 tonnes per year, taking into account the implementation of selective collections, the evolution of sorting standards and applicable environmental requirements. The works had to be undertaken in the first two years while keeping the centre fully functional during the works.

Criteria for the award were: technical and environmental quality criteria; economic and financial quality criteria and quality of the exploitation service and of sustainable development.

Today, the Centre of Vert-le-Grand contains an energy generation incinerator, a sorting centre of recyclable packaging and a glass unit. The entire centre was conceived under the imperative of respect for environment. Overall, the investment result in a reduction of CO2 emissions by 25 000 tonnes per year (or the contribution of a 700 ha forest). The Centre generates its own electricity and electricity for over 33 000 households as well as heating for 46 000 households.

This project is a successful example of how tender procedure under the Directive can result in environment protection and savings for the taxpayer's money. The initial total estimated value of the concession was of 782 000 000 EUR and the concession was awarded for 705 000 000 EUR, generating thus a saving of almost 10 % of the initial estimated value. It is important to mention that in this saving is even more remarkable given that this is a tender with only one tenderer.

7. SPECIFIC EXCLUSIONS IN THE FIELD OF WATER

Water is a public good of fundamental value for all EU citizens. Water policy is inherently complex and strongly linked to domains that are critical for development, including health, environment, agriculture, energy, spatial planning, regional development and poverty alleviation[78]. The water sector is regulated at national and EU level.

At EU level the main legislative acts concerning drinking water are: the Directive 2000/60/EC[79] known as the Water Framework Directive, the Council Directive 98/83/EC[80] known as the Drinking Water Directive and the Council Directive 91/271/EEC[81] known as the Urban Waste Water Treatment.

[78] "*OECD Principles on Water Governance*" Centre for Entrepreneurship, SMEs, Regions and Cities, Adopted by the OECD Regional Development Policy Committee on 11 May 2015.

[79] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327 , 22/12/2000 p. 1

[80] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, 5.12.1998, p. 32.

[81] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment OJ L 135, 30.5.1991, p. 40.

7.1. Societal considerations

The Council of the EU adopted Conclusions on Water Diplomacy on 19 November 2018 (Conclusions) recognising that water is a prerequisite for human survival and dignity and a fundamental basis for the resilience of both societies and the environment. Water is vital for human nutrition and health, and essential for ecosystem management, agriculture, energy and overall worldwide security. Ensuring sustainable access to safe water and sanitation, achieving sustainable water management, preventing scarcity and reducing flooding events are key global challenges of the 21stcentury[82]. The EU is committed to the human rights to safe drinking water and sanitation, as components of the right to an adequate standard of living. The EU recognises that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.

The Right2Water[83] is a citizens' initiative which gathered 2 million signatures (the highest number of signatures collected). The initiative, which was received by the Commission on 20 December 2013, demanded that (a) the EU institutions and Member States be obliged to ensure that all EU citizens enjoy the right to water and sanitation; (b) that the water supply and management of water resources not be subject to 'internal market rules' and that water services are not subjected to liberalization; and (c) that the EU increases its efforts to achieve global access to water and sanitation.

7.2. Economic considerations

From an economic perspective, it is widely recognised that water is a highly capital-intensive sector, with important market failures which require some additional co-ordination or State involvement. They include the following: (i) the essential nature of water may make it ethically indefensible to make consumption exclusive; (ii) investments in pipeline networks offer distant and risky paybacks but immediate and wide-ranging benefits; and (iii) the scale of the sunk investments may make the resulting "natural monopoly" virtually non-contestable. Even an efficient naturally monopolistic operator, offering water to urban centres as well as remote rural locations, will be unable to defend itself against focused entrants allowed to cherry-pick some unbundled service and undercut the incumbent's average price[84]. The recognition of societal significance and prevention of market failures in the water sector has led to the special treatment in the Concessions Directive.

7.3. Exclusion in the field of water

Recognizing complex arrangements that may be required given the importance of water as a public good, the Concessions Directive envisages a special exclusion in this field, as specified in Article 12. The Concessions Directive shall not apply to the following concessions awarded by a contracting authority or entity:

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82 https://www.consilium.europa.eu/media/37022/st13991-en18.pdf
83 https://right2water.eu/
84 Boscheck, R. (2002), page 141.

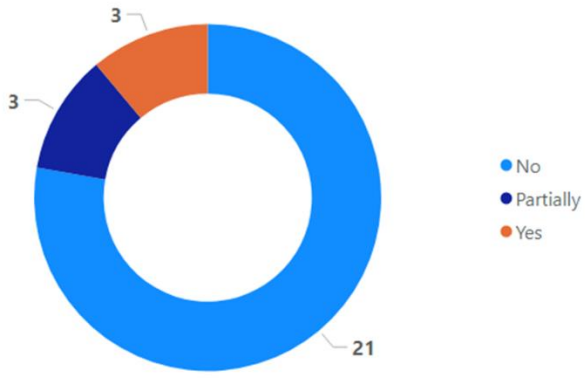
- all concessions the subject matter of which is the provision or the operation of networks, if these networks are intended to provide a service to the public, and are connected with production, distribution or transport of water;
- all concessions the subject matter of which is the supply of water to the networks meeting the above-mentioned conditions.

The Concessions Directive shall also not apply to certain concessions the subject matter of which is the disposal or treatment of sewage, notably to those which are connected with the provision or the operation of the above-mentioned networks or with the supply of water to such networks.

Finally, the Concessions Directive shall not apply to concessions the subject matter of which are hydraulic engineering projects, irrigation or land drainage which are connected with the provision or the operation of the above mentioned networks or with the supply of water to such networks provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations.

The exclusion covers works and services concessions and was not transposed by all Member States. **Figure *33*** below presents the number of countries and their decisions concerning the transposition of Article 12.

Figure 33: Coverage of the water sector by the Directive (transposition of Article 12), by number of Member States



Source: Based on questionnaires submitted by Member States to DG GROW.

As presented above, three Member States (Czechia, Poland and Romania) decided not to transpose Article 12 and hence fully cover the water sector by the provisions of the Concessions Directive, and other three Member States (Bulgaria, France and Spain) did so partially. The remaining 21 Member States have transposed Article 12 and therefore do not apply the Concessions Directive to the water sector.

The organisation of water services is a matter of national competence. A widely used taxonomy elaborated by van Dijk and Schouten (2009) and presented below:

- Direct public management: the responsible public entity is entirely in charge of service provision and their management.
- Delegated public management: a management entity is appointed by the responsible public entity to execute the management tasks. Management entities usually remain publicly owned, although in some cases, there is the possibility of a minor private shareholding.
- Delegated private management: the responsible public entity appoints a private company to manage tasks, on the basis of a time-bound contract in the form of lease or concession contract. The ownership of the infrastructure remains in the hands of public authorities.
- Direct private management: under this system all management tasks, responsibilities and ownership of water utilities are placed in the hands of private operators, while public entities limit their activities to control and regulation.

As evidenced below, Member States have obviously chosen to apply various management models for the provision of water and services, depending on the specific characteristics and framework within which it operates as well as the different mix of advantages each model offers. As can be observed in **Figure *34*** below, 16 Member States have declared that more than one managerial model is being used.

Figure 34: Managerial models in the water sector

Management model	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	HR	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SI	SK	SE
Direct public					7%	<1%				10%	70%												33%				
Delegated public		*			25%	64%			*	57%	30%										*		52%	85%		85%	
Delegated private			*		59%	35%				33%			*										15%			15%	
Direct private					9%						*			*													
Mixed model							*					*				*											

Notes: dark blue field – the model is applied in a country, shares in yellow - data on drinking water only (not water output); shares in white - data on the overall sector. Source: Questionnaires submitted by Member States.

The following comments received from Member States mainly as part of the survey provides examples of the diversity of the management models within the Member States, depending on regional or local characteristics:

- **Belgium**: In Belgium, the water sector is under the management of the regions. In Flanders, water services are entirely under the delegated public management model. In Wallonia, the predominant system is delegated public management with a small private shareholding for the company responsible for wastewater treatment coordination. In Wallonia for individual wastewater treatment the predominant model is direct private management. Last, in Brussels, the model is mostly delegated public management, except for the treatment of wastewater where the model is delegated private management.
- **Bulgaria**: The activities related to the management, maintenance and operation of the water sector as well as the provision of services to the consumers are awarded by the Water Supply and Sewerage associations or municipal councils by concluding a contract in accordance with the Water Act or the Concession Act.

The management model for the water sector in Bulgaria is mixed. Most of the country has a delegated public management model, except for the Municipality of Sofia which has a delegated private model for the management of the water sector.

- **Denmark**: Since 2016 in Denmark there is a mixed model management for the water sector composed of private management and delegated public management. For the private management, there are around 21 000 consumer-owned water service providers, while for the delegated public management there are around 140 publicly owned limited companies responsible for water services, and around 110 publicly owned limited companies responsible for wastewater services.

- **Finland**: In Finland, according to the Water Service Act, municipalities are in charge of the general development of the water sector in their area. Within the 309 municipalities, there are one or more utilities providing water services in each area. The predominant management model is direct public management. Municipalities are in charge of provision, production and management of water services. About 70 % of the municipal water utilities are organised as municipal entities or municipal enterprises under the direct administration of the municipality. Lately Finland has moved slightly from direct public management towards delegated public management. Approximately 30 % of municipally owned water utilities are organised as companies. They have their own administration, but they are usually owned by the public sector, that is by municipalities. Additionally, Finland has over 1 000 (small) co-operatives, especially in sparsely populated areas, which are managed by consumers. These co-operatives can be mentioned as examples of direct private management in water sector. Finland is currently working on a national water services reform. The Finnish Parliament is addressing a citizens' initiative requiring a ban on the privatisation of water services. This could lead to strengthening the role of municipalities in water services provisions.

- **France**: The management and regulation of the water sector are two tasks carried out by the municipalities and inter-municipal structures in France. The choice of management method is characterized by the principle of freedom of administration for municipalities. Municipalities may choose between direct public management (*régie*) or to entrust the management to a third party, selected in the framework of public tendering processes, through a concession or public service delegation (*gestion déléguée*). Thus, France has a mixed management model. In the delegated management the performance of activities in the water sector is entrusted to an operator for a period no longer than 20 years.In 2017, 30 % of drinking water services in France were provided under delegated management, compared to 70 % under direct management. During the same year the sanitary services were at 23 % by delegated management and compared to 77 % under the direct management.

- **Greece**: The main model for water management in Greece is delegated public management. The Greek State delegated two public companies: E.Y.D.A.P. SA for Athens, and E.Y.A.T.H SA for Thessaloniki to providing water services. In those two cities, the delegation of water management is of a special type. The two public companies have been listed in the stock market for 20 years, and the Greek State has always been the main shareholder. The Law 1069/1980 mandates delegated public management in cities with more than 10 000 inhabitants; while in cities with less than 10 000 inhabitants, the management model is usually direct public management. In these cities, the municipality is the responsible public entity in

charge of water services provision. By law, every municipality can only have one operator providing water services within that municipality.

- **Italy**: The water sector structure in Italy is shaped by the Galli law (Law 36/1994) enacted as a response to resolve the critical situation concerning inadequate wastewater collection and treatment systems. Its implementation called for the management of optimal areas of operation (Ambito Territoriale Ottimale) under the direction of a local municipal authority. The optimal areas of operation are defined at the regional level (at the present there are 62 of them) and can delegate the management of water and wastewater services to either public enterprises, where private participation is not allowed (in-house operators), mixed public-private enterprises, where generally the public has the majority of shares, or purely private enterprises by means of a tender. Water services are locally provided in 48 % of cases by in-house operators; in 29 % of cases by joint-stock company, of which 12 % are in the stock exchange; in 2 % of cases by private concessionaires; and in the remaining cases, mainly located in South and Central Italy, the water services are directly managed by municipalities. In Italy, there are different managing systems for water services. About half of the population is served through the delegated public management model. Public Private Partnerships cover 36 % of the population; concessions cover 5 % of the population; municipalities directly provide water services to the remaining share of the population.
- **The Netherlands**: The Netherlands differentiates between drinking water sector, and sanitary services sector. In the drinking water sector, the Netherlands adopts a delegated public management model. Drinking water companies are 100 % owned by local and/ or regional governments. By contrast, for other sanitary services, the Netherlands adopts a direct public management model. Within the direct public management model, the municipalities are responsible for the collection and draining of storm water. Regional water authorities are responsible for purification of wastewater, groundwater management, and regional water system management. Lastly, the national government is responsible for national water system management.

The participation of the private sector in public utilities seem to have been promoted in a number of countries due to some expected benefits, such as improved service quality and efficiency, improved management efficiency (easier access to capital markets). Public involvement remained nevertheless important to cater for wider societal needs and quality standards.

Case Study – Position Paper of German Association of Energy and Water Industries (BDEW), and the German United Services Union (Ver.di) –Exemption of the water sector as a permanent solution

In Germany, securing the drinking water supply falls under the principle of local self-government. Germany does not apply the Concession Directive 2014/23/EU, but still shows a heterogenic picture of competition in the water sector, where the quality of water supply is increasing, according to the Position paper[85]. In Germany, each supplier is responsible for local network infrastructure to fulfil hygiene requirements and quality standards towards end

[85] BDEW and Ver.di, Exception of the water sector as a permanent solution, Position Paper

customers. The local networks are limited to one or few municipalities and suppliers can continuously adapt their own network to customer needs[86].

The German Association of Energy and Water Industries (BDEW) and the German United Services Union (Ver.di), maintain that the initiative "Right2Water" has shown that people in the European Union consider water as special good and reject obligatory competition in the water sector[87].

It is argued that complex tenders are cost-intensive and would have to be financed through water prices or charges, which in turn would affect the most vulnerable customers without providing a better or safer service[88]. Further to that, the application of the Directive is perceived as problematic for the functioning of structures for municipal water as would entail considerable transaction costs for renewal of concessions[89].

Accordingly, the Position paper concludes that the application of the Directive is not necessary in Germany as the sector already works efficiently under another legal framework: German jurisprudence and laws ensure transparency and non-discrimination, as well as provides for effective legal remedies.

Stakeholders' views

When asked about the main effects of the water exclusion both positive and negative during the stakeholders' event, most of stakeholders voiced their strong position that the systems works well and the exclusion shall be maintained. On the other hand, representatives of the business sector explained their positive experiences brought about by the Directive. Overall, it was agreed that there is "no one-size fits all" solution and generalisations shall be avoided. The choice of management system is contextual depending on local societal objectives (operating efficiency, long-term investment, affordability, water conservation, security of supply, public health etc).

As regards, the key principles of an efficient organisation of the water sector, participants in the event indicated in the first place the water sector exemption followed by public (local) ownership and by transparency.

On the question on the optimal management model, direct public and delegated public management models accounted for two thirds of the votes in the event survey, while delegated private and direct private accounted for one third.

Private sector involvement in the water sector was considered important for only half of the participants in the vote/survey, with one third of voters indicating that the involvement is not at all important (score 1 out of a 1 to 10 scale). During the discussions, most participants reiterated that involvement of private sector is not considered necessary, and to that effect examples of re-municipalisation of water services were mentioned.

[86] BDEW and Ver.di, Exception of the water sector as a permanent solution, Position Paper.
[87] BDEW and Ver.di, Exception of the water sector as a permanent solution, Position Paper.
[88] BDEW and Ver.di, Exception of the water sector as a permanent solution, Position Paper.
[89] BDEW and Ver.di, Exception of the water sector as a permanent solution, Position Paper.

Long-term investment was considered key by stakeholders, as infrastructure requires large continuing investments to remain effective. The following risks may appear depending on ownership/management models: in a publicly owned system, decision makers may choose prices below long-run average costs to win votes or they may restrict funding to meet overall government borrowing targets, while in privately owned systems firms might choose high dividends over maintenance and/or politicians might regulate prices below long-run average costs (a form of expropriation).

Interestingly, as regards SMEs, it was explained that, in Germany existing national framework ensured that the special position of SMEs is given through: proportionate selection criteria, allowing for bidding consortium, not prohibiting of reliance on the capacities of other entities and no self-fulfilment rate. As a result, SME represent the vast majority of the more than 6 000 water supply companies in Germany.

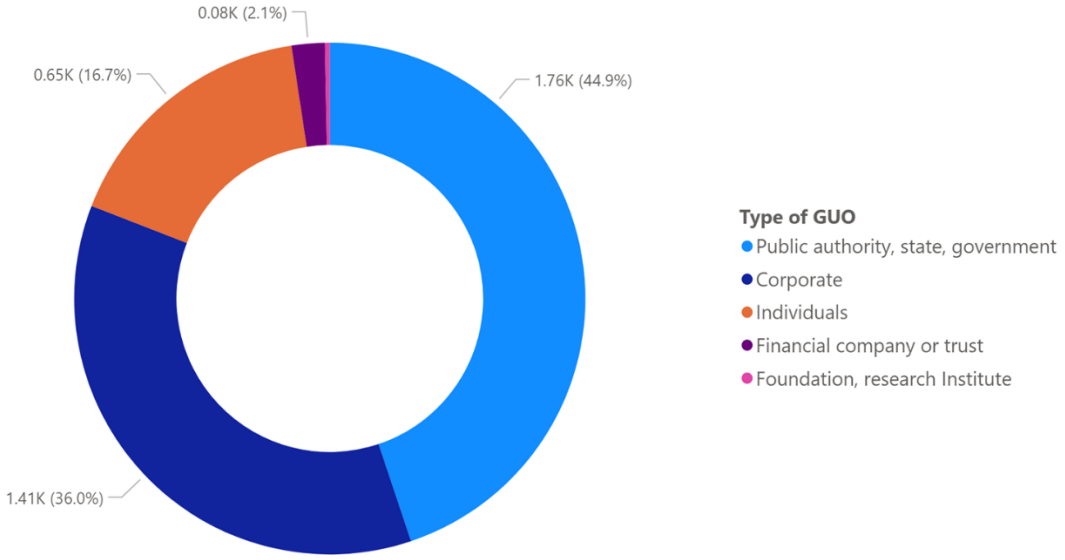
7.4. Key figures about the sector

The EU water industry supplies drinking water to 447 million Europeans while adhering to the highest water quality and environmental standards. According to Structural Business Statistics data of Eurostat, nearly 15 500 enterprises are active in the water collection, treatment and supply and 11 000 in sewerage in EU-27. Based on the latest available data, the annual turnover was roughly EUR 52.2 billion and EUR 23.6 billion for each of the two sectors. Companies active in the two sectors employed roughly 446 000 people.

Companies active in the sector represent various types of the global ultimate owners[90]. As the list features the largest companies, the ownership by public authorities or corporate prevails. Nonetheless, the situation across the water sector in general may be different as evidenced by the following table.

Figure 35: Global ultimate owners of medium-size and large companies active in the water sector in EU-27, by type [number of companies]

[90] The methodology for the identification of the Global Ultimate Owners by Orbis BvD is provided in the Annex (section 6.1.3). The minimum percentage of control in the path from a subject company to its Ultimate Owner chosen for the presented analysis was 50.01 %.



Source: Orbis BvD (uploaded on 18/01/2022)

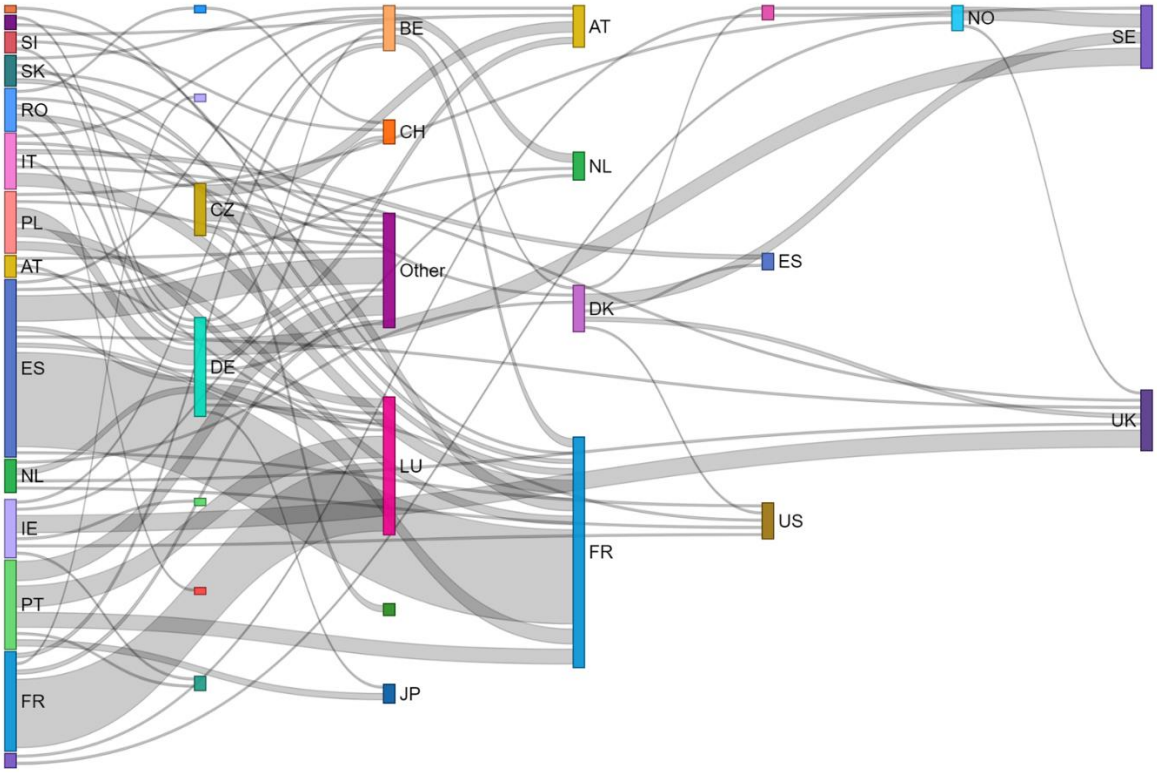
Out of companies listed in Orbis BvD database, generally middle-size and large companies; the main type of ultimate owners in the sector were still public authorities and governments (nearly 45 % of all non-missing observations[91]). This concerned all utilities run by local governments, such as *Stadwerke* in Germany, *miejskie* or *gminne zakłady komunalne* in Poland, or for example *kommunalförbund* in Sweden. The second most frequent type of owner was corporate (36 %), followed by individuals. Finally, 2.1 % of observations related to financial markets investors[92].

As far as the location of Global Ultimate Owners of firms operating in the sector is concerned, the vast majority of them is domestic. When looking again at middle-size and large enterprises with main activity in NACE Rev.2 E36.0 or E37.0 (4 822 firms), 5.7 % of them (273) had global ultimate owners which were not domestic (i.e. not equal to the country of registration of the company in question). Figure 22 below presents the location of the Global Ultimate Owners (the right-hand side of the nodes on the graph) of these 273 companies. The country of the firm active in the water sector is presented on the left-hand side of the nodes. The larger the node is, the more companies are concerned by an ownership relation between a particular pair of countries. For example, 44 companies in Spain are owned by Global Ultimate Owners located in France. The second largest node links France and Luxembourg, where 32 French middle-size or large utility companies are owned by investors registered in the Grand Duchy. Sweden is the location of Global Ultimate Owners which own eight companies in Germany, six in Norway and five in Denmark, whereas eight Irish middle-size or large water companies have their global headquarters in the United Kingdom.

[91] In the used dataset of middle-size or large companies active in the drinking water or sewerage sectors 907 companies (hence 18.8%) contained no information about the type of their GUO. Figure 23 is based on the remaining 3’915 observations.

[92] This group encompasses the following categories used in Orbis BvD: “Financial company", "Private equity firm", "Mutual and pension fund, nominee, trust, trustee".

Figure 36: Location of non-domestic global ultimate owners of medium-size and large companies active in the water sector in EU-27 and EEA [number of companies]



Source: Orbis BvD (uploaded on 18/01/2022)

Based on the above overview of middle-size and large companies, one can conclude that although the majority of companies active in the water sector are owned by public authorities or governments, certain degree of foreign ownership is present on the market. This happens especially through cross-border integration within large corporate groups active in the Internal Market.

7.5. Private sector participation in the water sector

As for any concession, the transfer of rights to operate, maintain and carry out investments in a public utility can also occur in the field of water. As in any other sector, private involvement in the water sector can therefore follow different scope, duration, remuneration patterns and various levels of risk transfer.

Historically, the involvement of private operators in this sector is not new, as various forms of private participation has been observed across many European countries since several decades. For example, lease contracts and management contracts in the water sector have been particularly frequent in France (locally referred to as "*affermage*") or Spain. According to GWI WaterData[93], the first contracts of such type were concluded

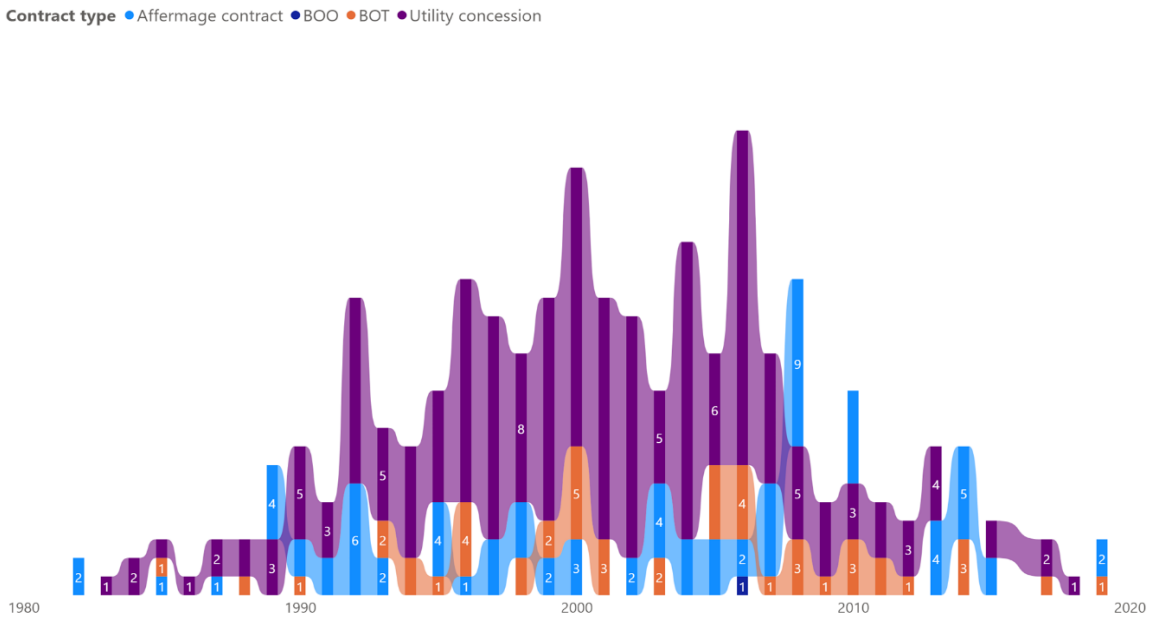
[93] The GWI Global Ultimate Owners database contains details of municipal water and wastewater treatment projects where all or part of the capital investment cost was borne by the private sector. It also contains lease and *affermage* contracts, where these cover an entire utility system. Dams, flood prevention, stormwater drainage, irrigation, surface water remediation and raw water transfer projects are not included, as they fall outside our scope of coverage. Some minimal thresholds for including water treatment projects were applied in the database (e.g. a population served of 10 000). Selected bulk water conveyance and sludge treatment projects have also been

already in the 19th century. For example, a 60-year concession to supply water to the city of Alicante was granted in 1893 and water supply to the city began in 1898. The typology of private sector participation models in the water sector based on GWI WaterData definitions is provided in Table 11 in the Annex[94].

The evolution in the number of contracts involving private operators in Europe[95] can be illustrated using the GWI WaterData database, which contains 373 projects concluded between 1890 and 2019. The overall number of contracts involving private partners increased significantly starting from the 1980s (344 contracts out of 373 recorded after 1980). When looking into the exact contract types concluded in this period, the concessions clearly dominate (211 contracts out of 344), followed by *affermage* (82) and then build-operate-transfer (50).

Figure *37* below shows the interchanging shares in the type of private participation contracts in the water sector over the last four decades.

Figure 37: Number of contracts involving private participation in the water sector in Europe in 1980 to 2019, by contract type and year



Source: GWI WaterData (uploaded on 13/01/2022)

When it comes to contract duration, agreements lasting for up to 30 years dominated the water market (see **Figure *38*** below). Nonetheless, the GWI WaterData database recorded

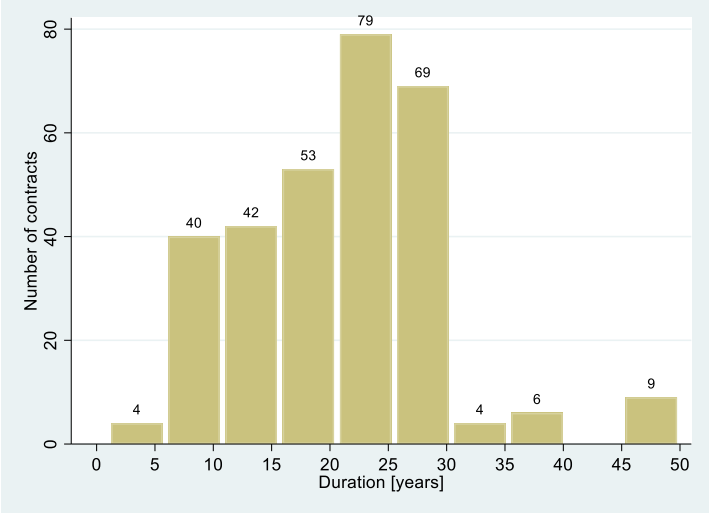
included where private finance is involved. This database does not include projects treating industrial wastewater or raw water for industrial use, except in the case where the feedwater is municipal wastewater. For further details, please consult the database provider – GWI WaterData (source: www.gwiwaterdata.com).

94 Build-Transfer projects, where private sector investors fund an asset during the construction stage but transfer it to the public sector upon completion, have not been included because they do not represent a long-term transfer of financing risk to the private sector. Build-Transfer-Operate and Build-Transfer-Lease projects have, however, been included because they represent a long-term outsourcing of infrastructure management to the private sector. Privatised or part-privatised utilities, where there is no fixed end date for private sector involvement, are not included within this database. Source: www.gwiwaterdata.com.

95 www.gwiwaterdata.com ; the private sector participation data is available only for the following eighteen countries of EU27: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain.

two contracts with a duration of nearly 100 years (not shown on the figure as such long lasting contracts were usually the historic ones, concluded before the analysed period of 1980 to 2019). The data below however only covers the initial duration of the concessions, and do not include contract extensions, which means that many of the recorded contracts could have a longer duration.

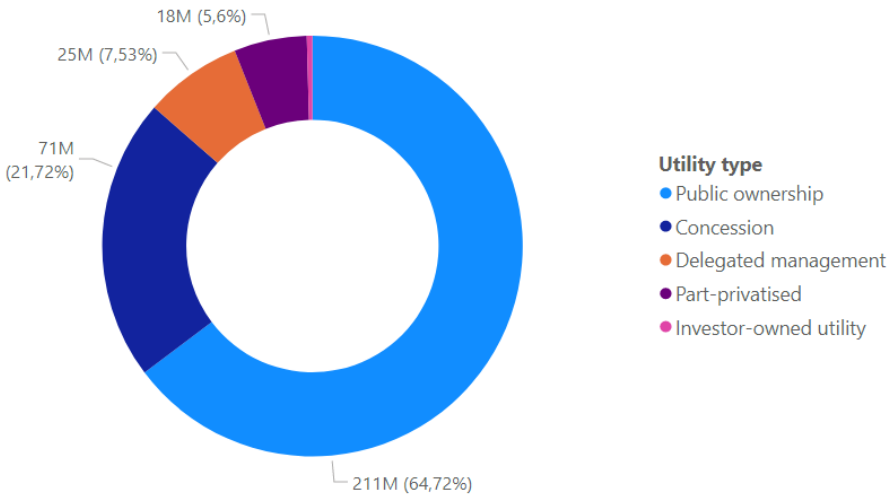
Figure 38: Number of contracts involving private participation in the water sector in Europe in 1980-2019, by contract duration



Source: GWI WaterData (uploaded on 13/01/2022)

The role and economic importance of the various actors involved in the sector can be assessed by looking at the percentage of the populations served by the different types of utilities operating in the sector.

Figure 39 : Population served by different types of utilities in the drinking water sector in selected European countries [in million]



Source: based on GWI Water data (uploaded on 13/01/2022)

As shown in Figure 26 above, GWI WaterData utilities data confirms the predominance of the public ownership structure in the water sector in Europe - public companies supplied drinking water to roughly two third of people served by the companies for which data was collected (i.e. nearly 211 million of Europeans used the services of public operators recorded in the database). Another 71 million people used water supplied by firms that concluded a concession agreement (nearly 22 %).

Case Study – Water Sector in Portugal

This case study presents a comparative assessment of the water sector in Portugal focused on private and public involvement. It is based mainly on three different reports: the Deloitte study[96], the PENSAAR report[97], and the report of the Regulatory Entity for Water and Waste Services ("ERSAR").

Portugal is one of the 21 countries among the Member States that has transposed Article 12 of the Concession Directive 2014/23/EC, and therefore does not apply the Concessions Directive to the water sector. The water sector in Portugal is characterised by different management models, and the services are provided either by public entities or private companies[98]. In Portugal, three management models coexist: a) direct public management, b) delegated public management and c) delegated private management[99]. The management of the systems includes municipalities, associations of municipalities, municipal and inter-municipal undertakings, public undertakings (including concessionaires), private concessionaires and private undertakings providing management services[100].

Private concessions are allowed under Portuguese law[101]. The PENSAAR report recognises their contribution to the Portuguese economy as significant, and generally as a tool that can contribute to various objectives, such as efficiency gains, cost optimisation, human resource empowerment, internationalisation of the sector and job creation in the private sector[102]. In addition, the Deloitte study of the water sector in Portugal presents advantages and disadvantages for each management model, showing however that the private sector performs slightly better than the public sector. Some of these findings of the Deloitte report are confirmed by the PENSAAR report and by the 2020 ERSAR report. The following elements are highlighted by the reports:

- Poor performance of a large number of water sector operators. The PENSAAR report found that more than 50 % of the operating entities had unsatisfactory assessments[103];
- For the rehabilitation of pipelines and collectors, the public sector presents better results than the private sector, nevertheless, both have an unsatisfactory service quality[104] ;
- The regulatory authority reports high-level standards for quality water.[105] However, the Deloitte study reports that the private sector presents a better drinking water quality as well as a better fulfilment of the discharges license than the public sector[106] ;

[96] Deloitte study, 'Relatório final l Advisory Regulação de Serviços de Águas AEPSA - Associação das Empresas Portuguesas para o Setor do Ambiente' (2019).

[97] PENSAAR is a monitoring Commission set up by Order No 9304/2013 of July 02 of the Secretary of State for the Environment and Spatial Planning. The Monitoring Commission was set up to draw up the plan 'PENSAAR 2020 — A new strategy for the water supply and sanitation sector'.

[98] ERSAR Report 2020, CARATERIZAÇÃO DO SETOR DE ÁGUAS E RESÍDUO, Volume 1, 409-410.

[99] EurEau Report (2018): 'The governance of water services in Europe'. ERSAR Report 2020, CARATERIZAÇÃO DO SETOR DE ÁGUAS E RESÍDUO, Volume 1, 55-57.

[100] ERSAR Report 2020 Volume 2, CONTROLO DA QUALIDADE DA ÁGUA PARA CONSUMO HUMAN 2020, Prefacio, 3.

[101] Decree-Law 194/2009 amending Decree-Law No. 379/93 of 5 November and Decree-Law No. 207/94 of 6 August and Decree-Law No. 147/95 of 21 June. The Decree-Law has been amended by Law no. 12/2014 of 5 march 2014.

[102] PENSAAR 2020, 'A strategy for the service of population: quality services at sustainable price' Recital 14.

[103] ibid Recital 43, Recital 224.

[104] ibid 37.

[105] ERSAR Report 2020 Volume 2, CONTROLO DA QUALIDADE DA ÁGUA PARA CONSUMO HUMAN 2020, 13-14.

- The private sector has satisfactory and higher answering rates than the public sector in the customer support system, both in water supply and sanitation sectors[107];
- The private sector presents less failures in supply and floods than the public sector, nevertheless both sectors present unsatisfactory results when floods occur[108];
- Considering the water losses as an important environmental indicator, the private sector offer a good service, while the public sector presents unsatisfactory results[109];
- The public sector presents better accessibility and affordability indicators, although the private sector presents satisfactory values[110].

The information presented by the several reports in this case study show a mixed picture for the water sector in Portugal. On the one hand, private operators in Portugal are seen as a strength of the sector[111]; on the other hand, public operators while a bit underperforming compared to the private sector, still have their strengths.[112] An exact conclusion on the functioning of concessions in Portugal appears therefore very difficult to determine.

7.6. Impact of the Directive on the water sector

This section focuses on impacts that the Concession Directive might have had on the water sector and the internal market, depending on Member States' choices made during its transposition. Whenever feasible, the discussion on differences between water sector organisation across the EU will be complemented by data on outputs linked to the transposition choices made[113] or differences between the ownership models that are present on the market.

Based on GWI WaterData historical data on the water sector (see Chapter 7.5), countries that have decided to apply the Concession Directive in the field of water have already had significant experience with similar public private partnerships projects in the past. As shown in **Figure *40*** below, around 70 % of private sector participation projects recorded in the GWI WaterData database took place in Member States, where the water sector is either fully covered by the provisions of the Concession Directive or covered partially.

Figure 40: Number of contracts involving private participation in the water sector in Europe in 1890-2019, by country transposition of Article 12

[106] Deloitte study, 'Relatório final l Advisory Regulação de Serviços de Águas AEPSA - Associação das Empresas Portuguesas para o Setor do Ambiente' (2019) 33.

[107] ibid 34. PENSAAR 2020, 'A strategy for the service of population: quality services at sustainable price' volume 1, Recital 43. PENSAARP 2030 'Strategic plan for the water supply sector and waste and rainwater management' volume 1, pp. 15-16.

[108] Deloitte study, 'Relatório final l Advisory Regulação de Serviços de Águas AEPSA - Associação das Empresas Portuguesas para o Setor do Ambiente' (2019) 35.

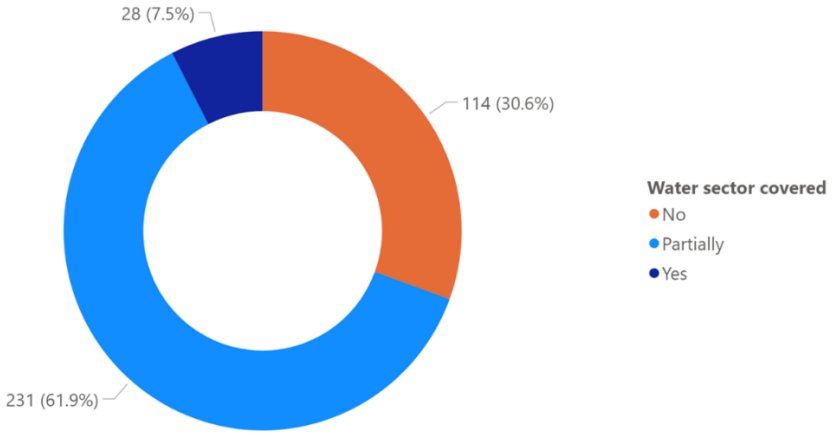
[109] ibid 36.

[110] Deloitte study, 'Relatório final l Advisory Regulação de Serviços de Águas AEPSA - Associação das Empresas Portuguesas para o Setor do Ambiente' (2019) 38. PENSAAR 2020, 'A strategy for the service of population: quality services at sustainable price' volume 1, Recitals 282-285, Recital 43. ERSAR Report 2020, CARATERIZAÇÃO DO SETOR DE ÁGUAS E RESÍDUO, Volume 1, 390.

[111] PENSAARP 2030 'Strategic plan for the water supply sector and waste and rainwater management' volume 1, Table 2.5, 16.

[112] To improve municipally owned managing entities, the 2030 PENSAAR report refers as a strategic objective to transition to more specialized entities with business-model-like organs, see PENSAARP 2030 'Strategic plan for the water supply sector and waste and rainwater management' volume 1, p 68.

[113] The clusters of countries were defined in section 7.3, according to the replies received in the Member States survey, notably: countries that have applied the exemption foreseen in Article 12 (i.e., "Water sector covered – No"); countries that partially applied the exemption foreseen in Article 12 (i.e., "Water sector covered – Partially"); countries that have not applied the exemption foreseen in Article 12 (i.e., "Water sector covered – Yes").



Source: GWI WaterData (uploaded on 13/01/2022)

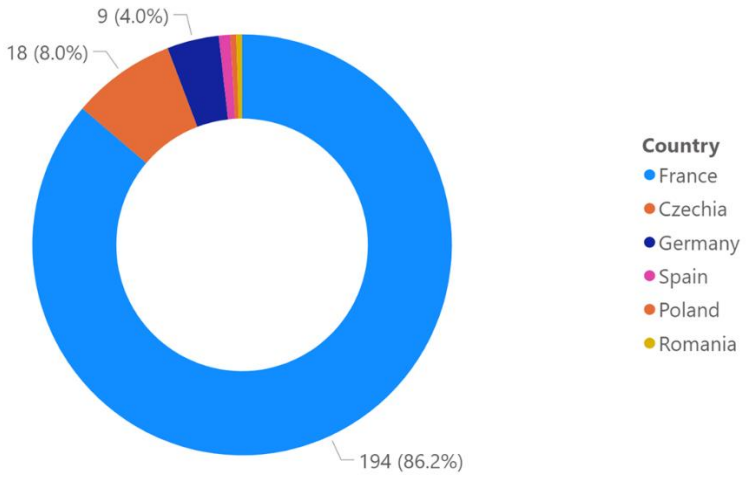
Experience in public private partnerships might have influenced the Members States decision on whether or not to cover the sector by the common EU rules on concessions. Interestingly, countries which have decided that the water sector should not be covered by the Concession Directive included countries that had quite an extensive experience with private sector participation, such as Italy (45 projects), Portugal (28) and Germany (11).

Water concessions awarded under the Directive

Since 18 April 2016 – the transposition deadline, 225 concessions award notices were published in Tenders Electronic Daily informing about the award of concession contracts in the water sector[114]. As shown in Figure 28 below, between 2016-2021 the vast majority of these contracts were concluded by French contracting authorities (194 observations or 86.2 %), followed by Czechia (18 contract award notices, equivalent to 8 % of all cases), Spain, Poland and Romania. The vast majority of the above concessions for the supply of drinking water and sanitation were awarded by regional or local authorities, metropolitan authorities or specialised entities in charge of such services in the area (e.g., *syndicat mixte des eaux, syndicat intercommunal des eaux*).

Figure 41: Concession award notices in the water sector by country [number, %]

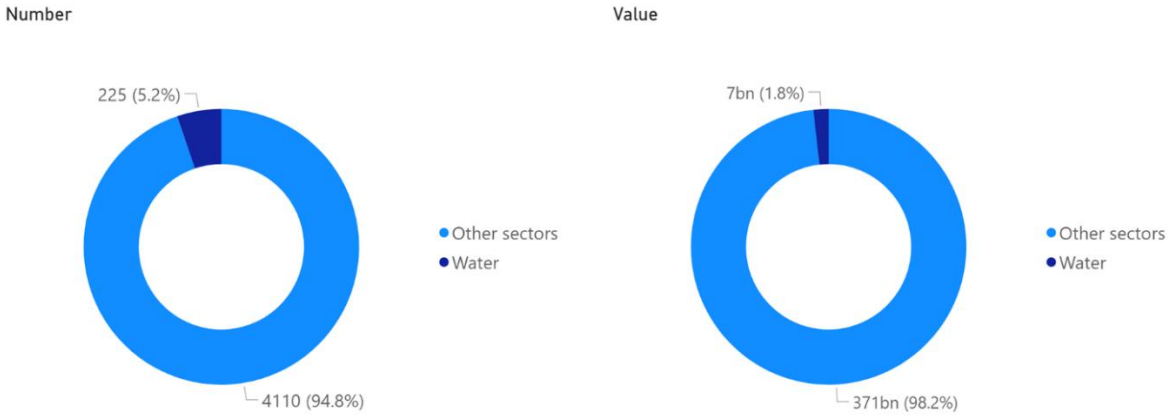
[114] Defined as encompassing all observations where the main Common Procurement Vocabulary code declared in the concession award notice started with "651" (i.e. 65100000-4 Water distribution and related services, 65110000-7 Water distribution, 65111000-4 Drinking-water distribution, 65120000-0 Operation of a water-purification plant, 65121000-7 Water demineralisation services, 65122000-0 Water desalination services, 65123000-3 Water softening services, 65130000-3 Operation of water supplies).



Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016 to 2021, EU-27 and EEA

The concessions in the field of water accounted for 5.2 % of all concession award notices published in 2016-2021 and amounted to nearly EUR 7 billion. The value of such concessions constituted less than 2 % of the total value of concessions published over the investigated period.

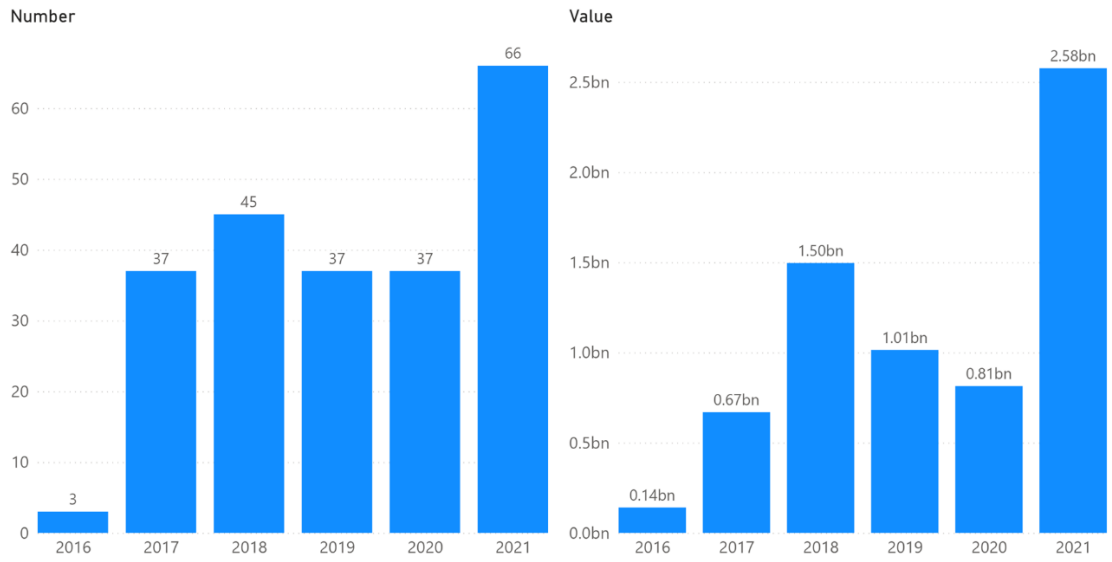
Figure 42: Concession award notices published [number, value in billion euro, %]



Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016 to 2021, EU-27 and EEA

The number and value of the concession award notices in the water sector increased significantly as from 2016, but the trend seems to have been even in the following years. The significant increase noticed in 2021 appears to compensate for the relative decline in the number and value of the concessions awarded in 2019 and 2020.

Figure 43: Concession award notices in the water sector by year [number, value in billion euros]



Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016to 2021, EU-27 and EEA

Case study - Water sector in France

France is one of the Member States that applies partially the Concession Directive to the water sector and it accounts for the highest number of concessions awarded in this sector between 2016 and 2021.

Municipalities and inter-municipal bodies have a duty to determine water tariffs, the service level requirements and investments[115]. Their assemblies deliberate on tariffs and must abide by certain rules. Moreover, they are responsible for the service and handle complaints[116].

If water services are provided by a delegated private management body, the contract defines the terms for price evolution over its period[117]. From 2015 private operators have mandatory reporting obligations on the analysis on the water quality[118]. Transparency was a priority in France even before the Concession Directive was implemented. Water companies publish legal performance indicators in their annual reports for the attention of the organising authorities[119]. Both at national and European levels, they promote the accessibility of these criteria to consumers to inform them about water quality and service[120].

EurEau reports that performance improves gradually for most services in France: "in Paris, the drinking water networks operations were delegated to two private operators from 1985 to 2009. The results show leakage rates declining from 22 % in 1985 to 4 % in 2009. These

[115] EurEau, Water Matters: an insight into the success and challenges facing the European water sector (2017) (available at: file (eureau.org)) p 52.
[116] EurEau, The Governance of Water Services in Europe (2020) (available at: file (eureau.org)) p 30.
[117] ibid.
[118] EurEau, Water Matters: an insight into the success and challenges facing the European water sector (2017) (available at: file (eureau.org)) p 53.
[119] Tristan Mathieu, General Delegate of Professional Federation of Water Companies, Concession Directive in water and waste-water sector state of play in France after 5 years applying (2021) Power Point Presentation (FP2E) 5.
[120] EurEau, The Governance of Water Services in Europe (2020) (available at: file (eureau.org)) p 31.

improvements were obtained through district metering, the installation of GSM sensors to locate leaks and active leakage control measures"[121]. Furthermore, in terms of affordability, subnational authorities (départements) established a Social Fund for Housing which is co-financed by them and the water operators[122].

Generally referred to **concessions**, representatives of Federation of Water Companies reported that they **are deemed to contribute to**:

- Water quality (99.3 % compliance of top water analysis),
- Water resources protection (81.4 % of water efficiency contribution),
- Social innovation (500 000 supported vulnerable households to pay their water invoices),
- Consumer relationship innovation (94 % of consumers have the possibility to turn to the water mediator, and 80 % of the disputes are solved)[123].

Therefore, from the information presented above, the water sector in France is gradually improving thanks to the French legal tradition in the management of the water sector and the reinforcement of those rules via the implementation of the Concession Directive.

The participation of SMEs in the water concessions, estimated at around 10.7 % of the number of concessions, appear to be significantly lower than SMEs' share in all concessions awarded under the Concessions Directive, estimated at around 30 %. This difference can be explained by the fact that the sector is highly capital intensive, and this may constitute an entry barrier for SMEs. There was only one contract award notice in the water sector where the winning companies were of a mixed size. The remaining 88.8 % of notices reported awards to concessionaires classified as large enterprises.

The competition levels in the water sector appears to be somewhat lower than what was observed across all sectors, with an average number of bids received at 2.13 (compared to 2.44 offers for all award notices during the 2016-2021 period). This can also be explained by the fact the sector is highly capital intensive.

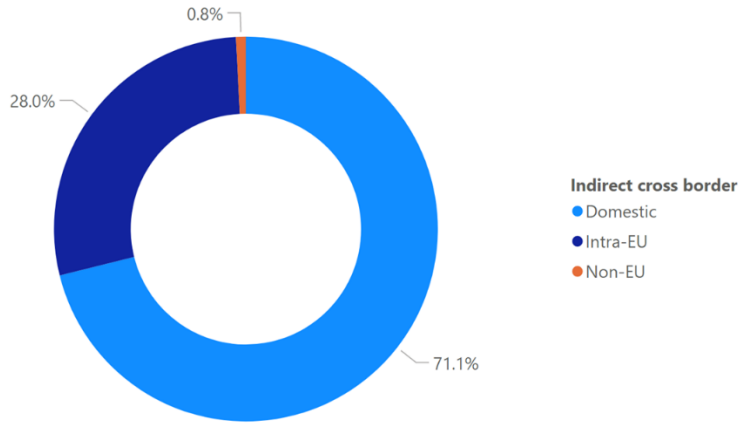
Finally, as far as the international presence in the water sector is concerned, the concession award notices published in Tenders Electronic Daily 2016-2021 reported no direct cross border awards. The foreign market presence through local subsidiaries was relatively frequent in the water sector concessions, reaching nearly 29 % of all such concessions awarded, while across sectors, only 13.7 % of concession contacts were awarded to local subsidiaries of companies located in countries different from the country of the contracting authority.

[121] EurEau, Water Matters: an insight into the success and challenges facing the European water sector (2017) (available at: file (eureau.org)) p 53.

[122] EurEau, Making the right to water and sanitation a reality in Europe, Briefing Note (2016) (available at file (eureau.org)) p 6.

[123] Tristan Mathieu, General Delegate of Professional Federation of Water Companies, Concession Directive in water and waste-water sector state of play in France after 5 years applying (2021) Power Point Presentation (FP2E) 3.

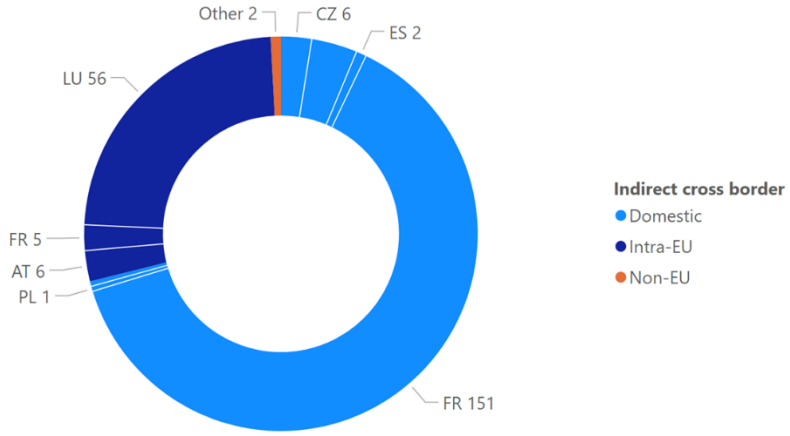
Figure 44: Indirect cross-border awards in the water sector by the location of the global ultimate owner of the winning company [%]



Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016 to 2021, EU-27 and EEA

Based on the number of award notices published by authorities applying the Directive, the vast majority of concessions won by domestically owned companies was recorded in France. Firms with global ultimate owners located in Luxembourg also secured an important share of intra-EU cross-border awards.

Figure 45: Indirect cross-border awards in the water sector by the location of the global ultimate owner of the winning company – overview by countries [number]

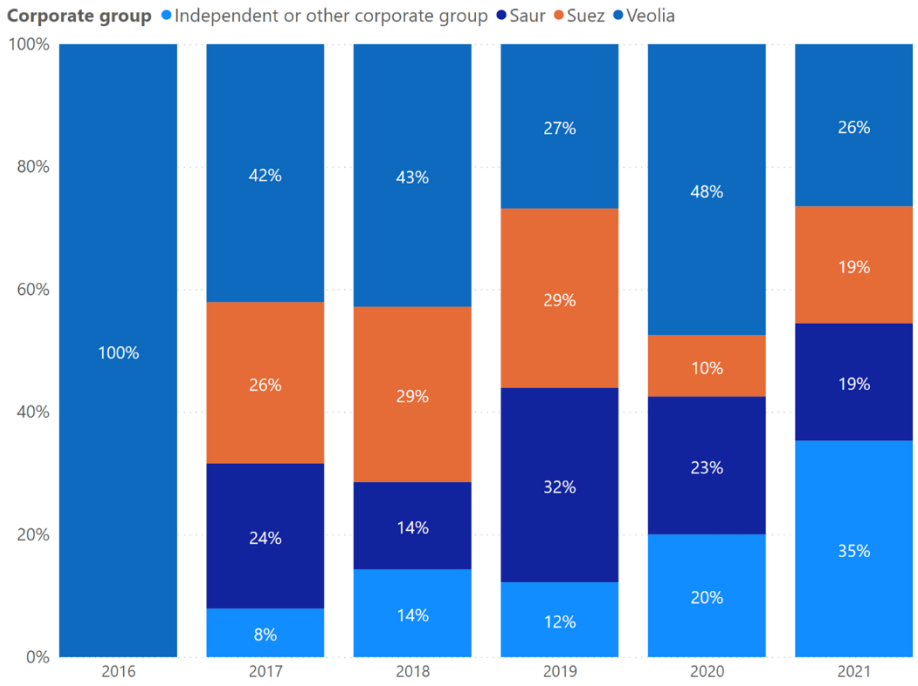


Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016to 2021, EU-27 and EEA

Looking more in-depth into the corporate ownership linkages of successful concessionaires in the sector, it seems that they most frequently belonged to one of the three large corporate groups active in the water sector in the EU, namely: Veolia, Suez and Saur. These three groups won nearly 80 % of all water concessions from 2016 to 2021 (36.8 %, 21.3 % and 22.2 %, respectively), located in various countries. Over the

entire period analysed in this evaluation, market shares became more equally spread, with independent companies or companies belonging to other corporate groups gradually gaining importance, from 8 % in 2017 to 35 % in the last year.

Figure 46: Indirect cross-border awards in the water sector by the location of the global ultimate owner of the winning company – main corporate groups by year [%]



Source: In-house analysis based on Official Journal/Tenders Electronic Daily data for 2016 to 2021, EU-27 and EEA

8. GENERAL CONCLUSIONS

The Directive has been transposed and is currently applied in all Member States. Most transpositions took place after the deadline of April 2016, with the last transposition in 2020. Due to delayed transposition and the lack of information that would allow a robust comparison pre- and post-Directive, it is too early to draw firm conclusions on whether the Directive has achieved its objectives.

In economic terms, there was a sharp increase in the number of concessions following 18 April 2016, which suggests that the Directive promoted transparency in the use of concession contracts across almost all Member States. The use of concessions is highly concentrated as four Member States (France, Italy, Germany, and Spain) account for 84 % of all post-Directive concession contracts with France alone standing at 40 % of all post-Directive concessions.

The average number of offers is 2.4 offers per concession notice but the trend is variable after 2016 and it does not allow to draw a clear conclusion about the extent to which the level of competition (measured by the level of participation in a concession tender procedure) has evolved.

The share of concessions awarded to SMEs has slightly increased since 2016. On average, between 2016 and 2021, SMEs won 29.2 % of concessions, and 3.6 % in consortia. The share of SMEs winning concession is nevertheless lower than SMEs share in the overall economy and the difference represents scope for further improvement. SMEs appear to be more successful in competitions for low value concessions, which can be explained by the required upfront investment and risk linked to concessions.

When analysing the value of concession award notices, high value concessions are awarded without prior publication of a concession contract notice, hence without a call for competition. Looking closely at this data it appears that such high value awards without calls for competition occur in the public utilities sectors and in particular in electricity distribution. The electricity sector is characterised by existence of special or exclusive rights, explaining the absence of publication of calls for competition.

The Directive applies fully to the water sector only in Czechia, Poland and Romania and partially in Bulgaria, France and Spain whereas the remaining 21 Member States have transposed Article 12 and therefore do not apply the Directive to the water sector. The assessment of the economic impact on the internal market of the exclusion of the water sector was carried out against this background involving limited information, which in turn rendered difficult to make firm and robust conclusions.

The concessions in the water sector represented 5.2 % of all concession award notices published in 2016-2021 and amounted to nearly EUR 7 billion or less than 2 % of the total value of concessions published over the investigated period. The number of offers received per tender and the percentage of SMEs winning such contracts are lower than in other sectors, which may be explained by the fact that the sector is highly capital intensive.

9. ANNEXES

9.1. Methodology and data sources

This report draws on the findings of the LE Europe study of November 2021 [LE Europe and Spark Legal (2021)], commissioned by the European Commission as a background document for this review. As the study covered public procurement notices published in TED until 2019, data covering additional years (notably years 2020 and 2021) was added in this report, by directly sourcing it from the publications available on the TED website (https://ted.europa.eu/TED/). TED data is also available in a CSV format under the EU open data portal (https://data.europa.eu/data/datasets/ted-csv?locale=en). Additionally, other data sources such as Orbis, SBS data or UNIDO were also referred to in the report. The following section discussed key data sources used in this report, as well as the methodologies applied when processing them.

9.1.1. *LE Europe and Spark Legal study*

As mentioned above, the main source of country knowledge and data related to pre-Directive period is the Study on the implementation of the Concessions Directive of November 2021[124].

While interpreting data sourced from the above study, it is important to note that in line with the explanation provided in the methodology section, the official transposition deadline (18 April 2016) has been used as the cut-off date to determine the pre- and post-Directive periods[125]. As the period covered by this study stretches from 2012, all observations identified as potentially related to concessions before 18 April 2016, refer to contract carried out using the general rules on the award of public procurement contract, namely Directives 2004/18/EC or 2004/17/EC. The identification of these observations was based in text matching (exact and fuzzy matching)[126]. Although significant effort have been put into checking the quality of the above data, this approach carries out some uncertainty on whether or not all the observations captured indeed referred to concession contracts.

To mitigate the above risk, namely to minimise the possibility of including false positive observations in the dataset analysed, OJ/TED data used for the assessment of the implementation of the Directive (i.e. chapters 3 and 4 of the report) relate exclusively to the publications on concession-specific standard forms.

9.1.2. *OJ/TED*

The key source of public procurement data related to the implementation of the Directive was Tenders Electronic Daily (“OJ/TED”) - the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement (https://ted.europa.eu/TED/main/HomePage.do). The publications take place using standard forms (“SF”), as defined in Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of

[124] LE Europe and Spark Legal (2021).
[125] Idem, page 176.
[126] Idem, Annex 2 Methodological annex, pages 171 - 201.

notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (Text with EEA relevance)[127].

All newly processed OJ/TED data used in this report cover years 2016-2021 and refer to EU-27 Member States and 3 EEA countries (Iceland, Liechtenstein and Norway). This dataset is used as a basis for discussing patterns in the implementation of the Concession Directive presented in chapters 5 and 6, whereas the earlier chapters predominantly refer to LE Europe and Spark Legal (2021). As explained earlier, the external study also used OJ/TED data as a starting point for their analysis, but it covered a different time dimension, as well as a more advanced methodology to identify relevant observations. Basically, the supplementary OJ/TED data was principally used to describe the implementation of the Directive, whenever findings from LE Europe and Spark Legal (2021) were not sufficient – this occurred in particular whenever the TED-based analysis presented in this report covered years beyond 2019 or aspects not discussed in the study with a sufficient level of granularity (e.g. international aspects). As a consequence, the following approach was undertaken when processing TED data covered by the Directive:

- Data used covered only publications on standard forms (SF) dedicated to the Concessions Directive, for example SF23 and SF25 in case of analysis of the results of concession award procedures; this means that contrary to the approach undertaken by LE Europe and Spark Legal (2021), no text matching was performed on other standard forms.

- Concession award notices (SF25) containing information about cancelled or ineffective procedures (e.g. no offers submitted) were removed from the dataset used.

- The analysis covered years 2016 - 2021 (the starting point is the first publication on a standard form dedicated to the Directive, which appeared in OJ S issue number 3/2016 on 4 January 2016).

- Contract values published in OJ/TED were subject to manual corrections: for the years 2016-2019 the corrections applied in LE Europe and Spark Legal (2021) were re-used; for the years 2020-2021 the data was inspected for outliers and manually checked if necessary.

- In case of the cross-border analysis - if the contract was awarded to many winners, only the first winner was taken into account assuming that the firm was the consortium leader. This in particular concerned the winners' country of location.

9.1.3. *Orbis BvD (Moody's Analytics)*

[127] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.296.01.0001.01.ENG

The findings concerning third-countries firm's presence on the EU market was estimated based on Orbis BvD[128] (a commercial database collecting broad range of company data including their ownership structure).

Data about the winning companies from OJ/TED were matched with Orbis BvD using batch-matching service. Companies with A match score were retained without scrutiny. The matching results for companies that received lower score but have been awarded more than 1 concession (750 firms) were inspected and, depending on the individual decision, could be matched manually despite lower score. At this stage, 977 out of 6 247 complete awards were still unmatched with Orbis BvD. The list of 977 firms was again subject to manual scrutiny and further 83 firms were matched with their Orbis BvD entries. The final result of matching is presented in Figure 47 below:

Figure 47: Matching results between OJ/TED winning companies and Orbis BvD data

Match results	Freq.	Percent
Not matched	894	14.34
Matched with A score	5 024	80.42
Matched manually	329	5.23
Total	6 247	

Overall, nearly 86 % of all records (companies winning concession awards) were successfully matched with Orbis BvD in order to upload additional information about these companies, such as the location and type of their global ultimate owners (GUO).

As far as the information on the GUO is concerned (i.e. their types and country of location), the following methodology is applied by Orbis BvD: to define an Ultimate Owner, the shareholding structure of a company having a BvD Independence Indicator different from A+, A or A- is used (which means that the company is independent and consequently, has no Ultimate Owner). The shareholder with the highest direct or total percentage of ownership is sought. If this shareholder is independent, it is defined as the Ultimate Owner of the subject company and an ultimate owner link is created between the subject company and the Ultimate Owner. If the highest shareholder is not independent, the same process is repeated to him until an Ultimate Owner is found[129]. Finally, the geographical location allows distinguishing between the Global UO from the Domestic UO. The minimum percentage of control in the path from a subject company to its Ultimate Owner chosen for the analysis presented in this document was 50.01%.

9.1.4. *Other data sources*

GWI Water data

[128] Orbis BvD database by Moody's Analytics, https://orbis.bvdinfo.com/
[129] Based on Orbis BvD glossary entry "Ultimate Owner identification".

9.1.5. *The Member States survey*

The Commission services launched an internal survey among Member States to gather information for the mandatory reporting on the water sector, as foreseen in Article 53 of the Concession Directive. The surveys were drafted in a word document and contained 10 predominantly open questions on legal issues, regulatory framework, managerial systems governing the water sector, etc. Because of its free-text structure, it allowed Member States representatives to provide extensive replies, as well as include links to external sources, such as national studies or databases. The questionnaires were sent to the representatives of Member States on 4 January 2021, with an indicative deadline of 31 March 2021. The last reply was received by the Commission services in August 2021. All Member States provided their contributions.

9.2. Supplementary data

Table 4: Concession award notices by procedure type and publication year [number]

Award procedure	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
Without publication	18	24	33	56	119	112	362
With publication	125	555	811	876	725	881	3973
Total	**143**	**579**	**844**	**932**	**844**	**993**	**4335**

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 5: Concession award notices by procedure type and publication year [value in million EUR]

Award procedure	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
Without publication	1141.7	1141	23561	45788.3	81785.2	43561	196978.2
With publication	12688.3	16992.4	38236.7	41486.5	34300.5	36913.3	180617.7
Total	**13830.0**	**18133.4**	**61797.7**	**87274.8**	**116085.7**	**80474.3**	**377595.8**

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 6: Concession award notices by sector [value in million EUR]

Sector	**Sum**
Services for citizens	35 871.63
Public utilities	199 371.80
Construction work	36 721.84
Transport	40 481.95
Environmental	20 724.48

Communication and IT services	35 933.11
Other	8 490.99
Total	**377 595.80**

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 7: Average number of offers per concession award notice, by year

Average	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**All years**
All sectors combined	2.93	2.68	2.52	2.25	2.30	2.48	2.44
Without Public utilities	3.03	2.69	2.57	2.29	2.45	2.56	2.52

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 8: Concession award notices by contractor size class and publication year [number]

Size class	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
SME	32	151	244	272	253	314	1266
Mixed	4	11	32	31	40	39	157
Large	107	417	568	629	551	640	2912
Total	**143**	**579**	**844**	**932**	**844**	**993**	**4335**

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 9: Concession award notices by contractor size class and publication year [value in million EUR]

Size class	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
SME	572.5	2031.9	3835	4832.9	10300.7	3157.9	24730.9
Mixed	182.2	1066.3	1252.1	1560.9	1161.0	599.1	5821.6
Large	13075.3	15035.2	56710.6	80881.0	104624.0	76717.2	347043.4
	13830.0	**18133.4**	**61797.7**	**87274.8**	**116085.7**	**80474.2**	**377595.9**

Source: In-house analysis based on OJ/TED data for 2016-2021, EU-27 and EEA

Table 10: High-level groupings for the sectorial analysis – list of CPV divisions

High-level group name	**CPV codes covered**
Services for citizens	55-Hotel, restaurant and retail trade..
	92-Recreational, cultural and sporting services
	85-Health and social work services
	98-Other community, social and personal services

	75-Administration, defence and social security services
	70-Real estate services
	80-Education and training services
	35-Security, fire-fighting, police and defence equipment
Public utilities	65-Public utilities
	09-Petroleum products, fuel, electricity and other sources of energy
	31-Electrical machinery, apparatus, equipment and consumables; lighting
	76-Services related to the oil and gas industry
Construction work	45-Construction work
	44-Construction structures and materials; auxiliary products to construction (except electric apparatus)
	71-Architectural, construction, engineering and inspection services
Transport	60-Transport services (excl. Waste tr..
	63-Supporting and auxiliary transport..
	34-Transport equipment and auxiliary ..
Environmental	90-Sewage, refuse cleaning and environmental services
	45262640-9 Environmental improvement works
	71313000-5 Environmental engineering consultancy services
	71313400-9 Environmental impact assessment for construction
	71313420-5 Environmental standards for construction
	71313430-8 Environmental indicators analysis for construction
	71313440-1 Environmental Impact Assessment (EIA) services for construction
	71313450-4 Environmental monitoring for construction
	71314000-2 Energy and related services
	71314200-4 Energy-management services
	71314300-5 Energy-efficiency consultancy services
	71314310-8 Heating engineering services for buildings
	80540000-1 Environmental training services
	45262640-9 Environmental improvement works
	71313000-5 Environmental engineering consultancy services
	71800000-6 Consulting services for water-supply and waste consultancy
	45112320-4 Land-reclamation work
	45112330-7 Site-reclamation work
	45112340-0 Soil-decontamination work
	45112350-3 Reclamation of waste land
	45112360-6 Land rehabilitation work
	09330000-1 Solar energy
	09331000-8 Solar panels
	09331100-9 Solar collectors for heat production
	09331200-0 Solar photovoltaic modules
	09332000-5 Solar installation
	31121300-3 Wind-energy generators
	31121310-6 Windmills
	31121320-9 Wind turbines
	31121330-2 Wind turbine generators
	31121331-9 Turbine rotors
	31121340-5 Wind farm
	44162500-8 Drinking-water piping

	45232150-8	Works related to water-distribution pipelines
	45232151-5	Water-main refurbishment construction work
	45251160-0	Wind-power installation works
	45251240-5	Landfill-gas electricity generating plant construction work
	45252120-5	Water-treatment plant construction work
	45252126-7	Drinking-water treatment plant construction work
	45252127-4	Wastewater treatment plant construction work
	45252130-8	Sewage plant equipment
	45252140-1	Sludge-dewatering plant construction work
	45252200-0	Purification plant equipment
	45252210-3	Water purification plant construction work
	45252300-1	Refuse-incineration plant construction work
	65100000-4	Water distribution and related services
	65110000-7	Water distribution
	65111000-4	Drinking-water distribution
	65120000-0	Operation of a water-purification plant
	65121000-7	Water demineralisation services
	65122000-0	Water desalination services
	65123000-3	Water softening services
	65130000-3	Operation of water supplies
Communication and IT services	32-Radio, television, communication, ..	
	64-Postal and telecommunications serv..	
	72-IT services: consulting, software	
Other	All remaining CPV codes	

Table 11: Private sector participation (PSP) contracts type in the water sector

Affermage contract	A contract type unique to the French market, and some French speaking parts of Africa. A private company is responsible for utility billing and operating expenditure, while the municipal client retains control of capital expenditure.
Build-operate-transfer	The client outsources the financing of the project to a private developer (or consortium of developers). The developer may be responsible for construction and operation of the asset, or they may subcontract to other private companies. The developer receives revenue through a water purchase/wastewater service agreement with the client.
Build-own-operate	Similar to a BOT contract, but the private developer does not transfer ownership of the asset at the end of the operating period. The contract duration is the length of the water purchase/wastewater service agreement between the client and the developer.
Build-transfer-lease	The private sector finances and builds infrastructure before transferring ownership to the government. The government then pays the private sector an regular fee to operate the infrastructure, and repay the capital outlay. Any user fee is paid to the government. Popular in South Korea.

Build-transfer-operate	Under this model the private sector finances and builds a facility before transferring the ownership rights to the government. It then receives the right to operate the facility for a set period of time and recoups its investment and operational costs through user fees or tariffs. Popular in South Korea.
Design-build-finance	Private party responsible for part-funding the construction phase of the project before being repaid via a number of staggered milestone payments, the last of which is made on commercial acceptance.
Independent water and power project	A combined power and desalination plant financed, built, and operated under a BOO/BOT type project structure. These contracts are typically confined to the GCC region. The project developer will sign a power and water purchase agreement with the utility client.
Utility concession	An agreement to hand over the running of an entire utility to a private company. The private company is responsible for capital investment and operating expenditure, but the client retains ownership of the asset. There may be an upfront payment or lease fee to the client. The private company is responsible for collecting water and wastewater charges, and this is their source of income for the contract.
Utility lease	An agreement to hand over the running of the utility to private company, in return for regular lease payments. The client retains ownership of the utility assets and has responsibility for capital investment, unlike a utility concession. The private company is responsible for collecting water and wastewater charges, and this is their source of income for the contract.

Source: GWI Water Data

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