

NEMZETI FEJLESZTÉSI  
MINISZTERIUM

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# Challenges of the transposition of the concessions directive

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## Questions arise on different levels

- Legal and regulatory questions of the transposition into the national legal system
- Questions of the organisation of SGEI in a member state



## The concept of concession in the new directive

### Elements of the concept:

- Contract (in writing)
- Between a contracting authority/entity and an economic operator
- Procurement of works/services
- The consideration consists in the right of exploitation or in that right together with payment
- + Transfer of an operating risk to the concessionaire



## Examination of certain elements of the concept

Classification becomes more important with the new directive

- Procurement

„Obtaining of the benefits” of the works or services

- Transfer of the operating risk



## Distinction from other agreements

The recitals distinguish concessions from:

- Agreements giving an authorisation (∅ procurement element)
- Exploitation of public domains or resources (∅ procurement element)
- Mere financing of an activity (∅ procurement element)
- Customer choice systems (∅ selectivity)
- Procurement contracts (based on risk)



## The Hungarian rules

Relatively detailed rules on works and services concessions in the Public Procurement Act (PPA):

- Definition of works and services concession (based on directives and ECJ practice) and rules on award procedures
- Rules for works concessions similar to rules of public works contracts
- Contract modification and remedies identical to public contract rules
- Partial regulation: Utilities are not covered
- Special regulation for certain services concessions (public passenger transport services; 'concessions' (HU))



## The domestic legal situation

- Does it mean that we do not have much to do to transpose the new directive?



## The domestic legal situation

Has the legal system really endorsed these concepts?

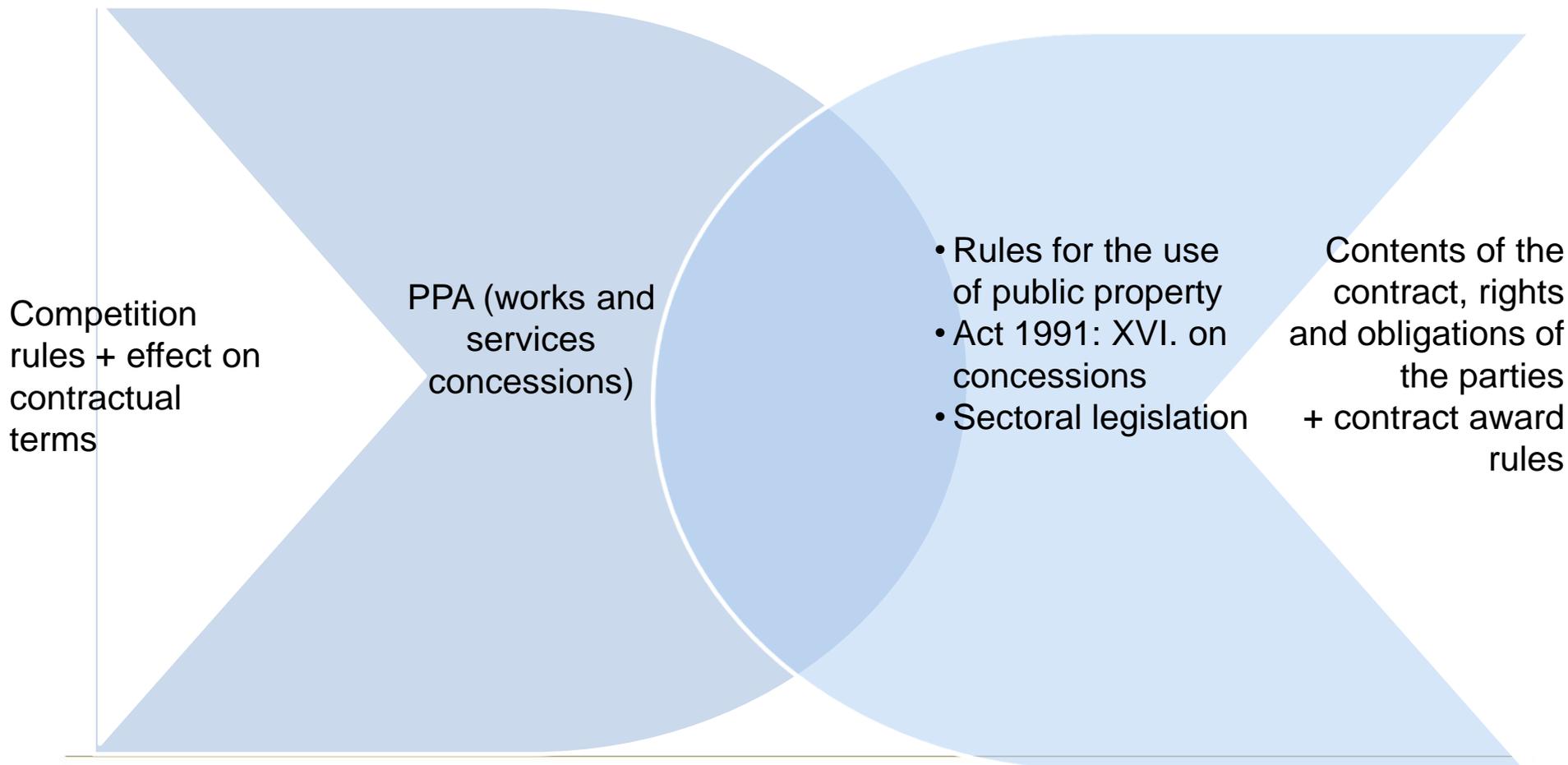


| Number of procedures | 2011 | 2012 |
|----------------------|------|------|
| Works concessions    | 5    | 1    |
| Services concessions | 3    | 1    |

- Where are the concessions?



## Relationship with previous legal concepts



## The 'concession contract' of Law XVI./1991.

The state or local government transfers the right to pursue its exclusive economic activities with contract, for a determined period of time, whereby it guarantees a partial market monopole to the beneficiary

Subject-wise it is a very heterogeneous institution, e.g.:

- Constructing and operating national public roads – procurement
- Organisation of lottery and tobacco retail-trade – authorisation to engage in an economic activity
- Operating facilities underneath public squares and parks – can be only property-utilization
- Road-search: what is the common core of these contracts?



## The possible way of implementation

- Unified regulation is necessary for the procurement-type contracts in regards matters determined by the directive
  - The law on national property gives significant importance to the (Hungarian) concession contract too – procurement-type concessions cannot be exempt from these rules
- The functions of regulations with different aspects need to be set straight



## The correlation of the definition and the corresponding regulation's function

High value procurement and risk-taking on the side of the concessionaire → competition and competition-related contractual questions are common

Exclusive state/local government property, economic activities constituting government monopolies, exclusive and special rights → rules for the coordination between public interest and the interests of the contracting party as well as rules for incorporating enhanced state supervision are common

Sectoral laws: specific rules adhering to the given sector's structure



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## The UNCITRAL Model Legislative Provisions and Legislative Guide on Privately Financed Infrastructure Projects

”Concession contract” relates to the building/renovation and operation of infrastructure facilities realised through private investments

Infrastructure facilities provide essential services to the general public

→ the model rules provide uniform rules for such projects (significant questions related to selection as well as contracts)



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## The UNCITRAL Model Legislative Provisions and Legislative Guide

Appropriate legal framework for infrastructural projects realised through private investments

Paying attention to public interest considerations

(e.g. continuity in the provision of public services, quality requirements and fair prices charged to the public)



## Public interest requirements in relation to public services according to the new directive

The directive's definition does not entail the SGEI element - rules concentrating on competition, but:

- Specific rule provides for the freedom of member states to determine and organise the SGEI as well as endorse particular requirements
- The directive does not affect the way in which member states organise their social security systems
- Public services can be organised as services of non-economic services of general interest, and can be financed in a way not to result in a public contract or concession
- Exception of the drinking water sector
- Special regime for social and other services



## The coherence with public service requirements – example of the change of circumstances

- **UNCITRAL rules: continuity in the provision of public services**

Change of circumstances or adjustment to public service needs – supervision may be necessary, compensation

In case of problems of execution step-in rights of the contracting authority or the lenders, termination is „last resort”

- **Directive: no distortion of competition**

In case of significant modification **new award procedure, termination of the former contract**

But: possibility of prior setting of supervision clauses

50 % modification is possible due to unforeseeable circumstances



## The different ways of organising public tasks

The directive declares the principle of „free administration”

- It does not regulate what shall be public property and does not encourage privatisation
- Does not result in liberalisation
- Does not influence whether member states undertake the tasks themselves or through outsourcing (but: there is only room for solutions in adherence to public-public cooperation rules!)
- Does not limit the application of other tools than public procurement or concessions



Thank you for your attention!