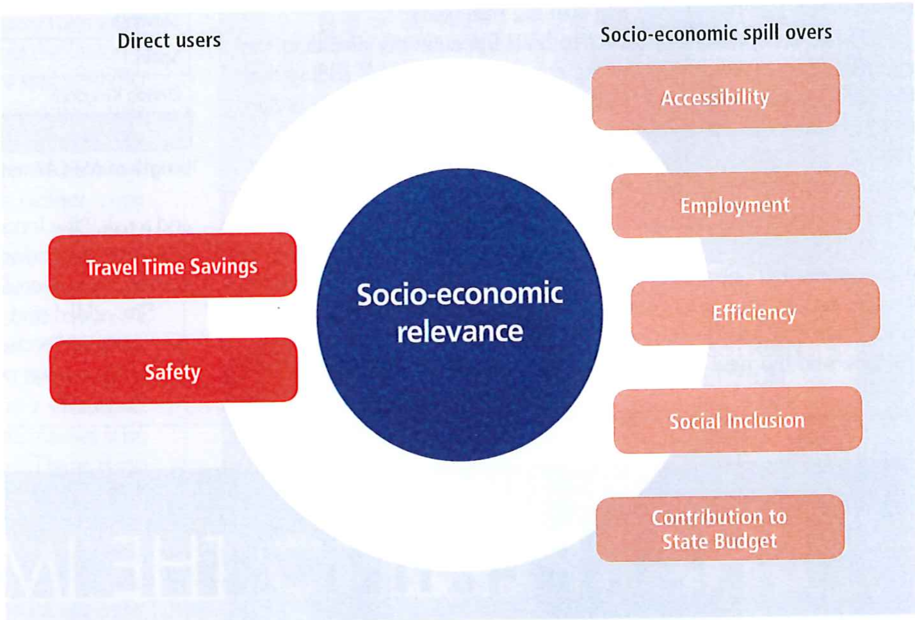
Redefining concessions

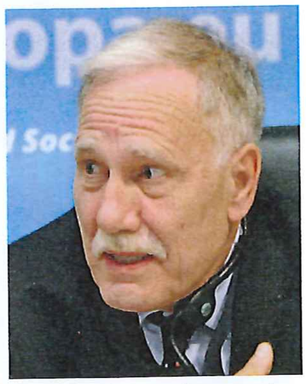
Colin Sowman picks some highlights from a one-day ASECAP conference about the EU's new regulations on concessions.

ASECAP, the association of European tolling companies, has outlined the scale of the challenge facing authorities and tolling companies in complying with the European Union's Directives 2014/23/EU and 2014/24/EU in a new report and at a special conference in Brussels.

The new directives refine and strengthen the definition of a concession and establish procurement rules for contracting authorities in respect of public contracts. One of the key areas in defining a concession is that the concessionaire must be exposed to risks of making a loss and the report, compiled by PricewaterhouseCoopers (PWC), outlined the current situation in the various EU member states.

PWC undertook a performance survey of ASECAP members which collectively manage 48,000km of motorways, bridges and tunnels across 21 countries including half of the EU's 28 member states. In addition to reinforcing the concession's credentials in terms of supporting the 'user pays' and 'polluter pays' principals, contribution to authority coffers and local employment, the report considers the risks under four headings: political and legal, economic and financial, construction related, and further risks. In conveying how these risks are currently distributed it highlighted nine EU countries: Austria, France, Greece, Hungary, Italy, Poland, Portugal, Slovenia and Spain.





TOP: Socio-economic relevance of road transport projects ABOVE LEFT: Olivier Onidi - new framework was essential to strengthen the public acceptance of the concession model ABOVE CENTRE: Joanna Szychowska - many consider the rules are too flexible ABOVE RIGHT: Dominique Riquet - The user is a little bit tired, the taxpayer is absolutely exhausted

In the first category, risks include natural phenomena, force majeure, war or civil disturbance, legislative changes and changes in government policy. In Spain and Italy the authority takes all these risks while in France, Greece and Poland the concessionaires shoulder only the risks associated with natural phenomena. The Slovenian authorities cover only risks associated with war or civil disturbance while in Hungary the risks were shared equally between the authority and concessionaire as they were in Portugal, with the exception of force majeure (authority) and natural phenomena (concessionaire). Only in Austria does the concessionaire (the state owned company ASFINAG) shoulder all the risks in every category.

Economic and financial risks encompass uncertain economic growth, inflation rates, convertibility of currencies, exchange rates and access to financial markets). Only in Slovenia (access to financial market), Spain (currency convertibility and exchange rates) and Italy (inflation) do the authorities carry any of these risks.

Construction-related risks related to completion of work, quality of work, completion dates and the cost of postponement or modifications to the project – none of which was taken by authorities in Austria, Poland or Slovenia. However, authorities in the other countries take or share the cost of postponement or modifications to the project, while France and Italy also share the completion of works with Italian authorities also sharing completion date risks.

Further risks covers an increase in the tax share on tolls, commercial risks (such as decreased traffic) and operational risks (for instance disruption due to accidents). In six of the nine states the concessionaires carry all the risks while French and Spanish authorities take responsibility for any increase in tax and the Hungarian authorities carry the commercial risks.

From the floor the comment was made that if the concessionaires carry all the risks, tolling can become a 'political football' – examples of which had already been experienced by ASECAP members.

Defending the new legislation was Olivier Onidi, director of the European Mobility Network at DG MOVE, who said the Commission viewed the concession model as important in many sectors for both the construction and maintenance of new, high-quality infrastructure. However, he added that a new legislative framework was "absolutely essential in order to strengthen the public acceptance of the concession model which had been put at risk over the past years.

"Public acceptance is relevant to both the authority awarding the contract and company winning the concession," he said, adding that the concession model also acted as a check on the rationale for undertaking a project and as a facilitator for new financial schemes.

Joanna Szychowska, head of public procurement legislation unit at DG Market said that while concessions had been around for many years, "many countries did not admit they were passing concessions and as they were not calling it by its proper name it was very easy to escape rules and obligations. That is why it was so important to ensure we call certain contracts concessions and that we have clarity about what to do about those contracts."

She said the new definition of concessions is both an opportunity and a risk, "the long duration needed to recoup the investment is clearly subject to the performance of the market over 30 years and this is a risk that we have been facing for a long time."

She added that modifications allow for adjustments to the concession contract "because nobody can foresee everything that will happen in 30 years so we need rules that allow flexibility."

Full members	Network length (km)	% on the total national motorway network
Austria	2,177	100%
Croatia	1,289	100%
Denmark	34	3%
France	9,048	78%
Greece	1,659	87%
Hungary	1,145	74%
Ireland	337	37%
Italy	5,814	86%
The Netherlands	20	1%
Norway	911	NA
Poland	468	34%
Portugal	2,943	98%
Serbia	603	100%
Slovenia	607	79%
Spain	3,404	23%
United Kingdom	42	1%
Total	30,501	55%

Length of ASECAP network

In reply to a question she said directives were used instead of direct legislation because it allowed national governments the latitude to accommodate the differences between how the member states have been operating concessions. However, she added that it was important that everyone understands the rules in the same manner and hopes that in meeting over the past year, a consensus has been reached about what is understood by a concession or a modification.

"What is far more important is the implementation and the biggest risk to the regulations will not be in April 2016 but today where two regimes clash. Existing contracts are being modified and we are about to have new contracts and the position we take today to interpret the problems member states discuss with us has the potential to pave the way for the future. So transposition [into national law] is a key issue but we have to be extremely cautious about how we ask member states to use the rules."

Onidi added: "One of the biggest benefits of the new framework will be to strengthen concessions and put a lot of stress on the need for transparency. A big advantage we see of the new legislation is an improvement in certainty… as the treaty rules were too broad and we need a level playing field throughout the Union."

ASECAP's secretary general Kallistratos Dionelis said a 50/50 partnership between the authority and the concessionaire was necessary but he felt the new regulations made the authority the dominant player. Szychowska replied that it was important to ensure the legislation proposed by member states was neither 'copy and paste' of the regulations nor 'gold plating'."

ASECAP's immediate past president Jean Mesqui highlighted that the new regulations would not permit the leveraging of an existing and profitable concession to fund another socially desirable but economically unviable project as had happened in the past. Szychowska replied: "This is a problem that we have been discussing for a long time. You see [the new regulations] as a straitjacket limiting your activities while there are those in the market who would like to get a contract or offer their services. There is no other answer than the one the directive proposes that covers all the situations on a case-by-case examination.

"Many consider the rules on changes are too flexible; formula 43 is too broad. Unless you apply the rules to the letter, you can do anything you want and this is not the commission's intention. It is difficult to look for additional flexibilities when there is already flexibility there."

Onidi added: "The level of flexibility you will get in using this framework is directly proportionate to the transparency that surrounds the overall conclusion of the contract."

Dionelis urged the EU's legislators to consider the global context – particularly in respect to what constitutes state aid. He said companies from all over the world are competing for concession contracts in EU countries. "When we compete, the European Union is very hard in order to manage and regulate the state aid but with non-EU competitors this is not the case; the EU cannot deal with that because that is the work of the World Trade Organisation."

As a result he said there are two categories of competitors – those within the EU who fully respect the state aid regulations but he said he questions whether competitors from some other parts of the world respect the state aid rules.

The final session of the conference looked at key financial instruments including the 'Juncker Plan' which aims to increase employment by seed-funding projects that create employment. However, MEP and vice chair of the Committee on Transport and Tourism, Dominique Riquet, said the €315 billion was earmarked for more risky projects and the concession model has proved a perfectly satisfactory way of financing sections of the road network. He ended by saying: "The user is a little bit tired, the taxpayer is absolutely exhausted."

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