

## **ASECAP REFLECTION PAPER**

### **ON A POSSIBLE LEGAL INITIATIVE ON “CONCESSIONS”**

ASECAP FULL MEMBERS			Companies	Km
Austria		<b>ASFINAG</b> Autobahnen- und Schnellstraßen- Finanzierungs-Aktiengesellschaft	3	2.135,6
Croatia		<b>HUKA</b> Hrvatska Udruga Koncesionara za Autoceste s naplatom cestarine	4	1.240,7
Denmark		<b>SUND &amp; BAELT Holding A/S</b>	2	34
Spain		<b>ASETA</b> Asociación de Sociedades Españolas Concesionarias de Autopistas, Túneles, Puentes y Vías de Peaje	35	3.362,20
France		<b>ASFA</b> Association professionnelle des Sociétés Françaises concessionnaires ou exploitantes d'Autoroutes et d'ouvrages routiers	18	8.627,9
Greece		<b>TEO</b> Fonds Routier National Hellénique	7	916,5
Hungary		<b>AKA</b> Alföld Koncessziós Autópálya Zrt.	3	912
Ireland		<b>ITIA</b> Irish Tolling Industry Association	9	219
Italy		<b>AISCAT</b> Associazione Italiana Società Concessionarie Autostrade e Trafori	23	5.724,4
Norway		<b>NORVEGFINANS</b> Norske Vegfinansieringsselskapers Forening	32	796,5

Netherlands		N.V.Westerscheldetunnel	1	20
Poland		AWSA Autostrada Wielkopolska	3	300
Portugal		APCAP Associação Portuguesa das Sociedades Concessionárias de Auto-Estradas ou Pontes com Portagens	7	1.695,4
United Kingdom		Macquarie Motorway Group	1	42
Serbia		Public Enterprise "Roads of Serbia"	1	603
Slovenia		DARS Družba za avtoceste v Republiki Sloveniji, d.d.	1	592,5
<b>ASSOCIATE MEMBERS</b>			<b>Companies</b>	<b>Km</b>
Germany		TOLL COLLECT GmbH	1	12.775
Morocco		ADM Société Nationale des Autoroutes du Maroc	1	915
Slovak Republic		NDS Národná diaľničná spoločnosť	1	383,1
Czech Republic		KTS KAPSCH Telematic Services	1	1.236,5
<b>TOTAL TOLL NETWORK</b>			<b>155</b>	<b>29.757,7</b>

## Forewords:

ASECAP is the European Association of tolled motorways, bridges and tunnels concessionaires. It gathers 20 members representing 155 organizations that manage a toll network of over 40.000 km, mainly along TENs.



ASECAP's mission is to promote concessions schemes, and toll as the most efficient tool to finance the construction, operation and maintenance of safe, smart and sustainable road infrastructures.

ASECAP and its members are committed to:

- Strengthening the efficiency of their networks and permanently improving the level of service provided to the European citizens, by keeping up with the latest technology developments and the best operational practices;
- Exchanging information and experience, participating in research programmes and further developing and enhancing the direct “user-payer” toll system as an instrument of a sustainable, safe and environmentally friendly transport policy.

ASECAP draws from this representation a unique expertise recognized in the field of infrastructures financing, construction, management and maintenance.

ASECAP has been closely monitoring recent developments in the European Commission's review of community law on public contracts and concessions and the work performed by DG Internal Market on the possibility of completing the existing legal framework where necessary.

According to the Interpretative Communication of November 15th 2005<sup>1</sup>, the Commission declares to be in favour of a clearer delimitation between public procurement contracts and concessions.

ASECAP supports this conclusion of the Commission since concession contracts clearly differ from public procurement contracts, as they are long-term contracts and aim at transferring public service obligations to the concessionaire for the whole duration of the contract.

Going further, the Commission suggests that the objective of "drawing a clear dividing line between concessions and public contracts" could be reached by means of a new legislation on concessions.

As a reminder, the priority for ASECAP members is the **need for a clear and secure legal framework** for service concession award procedures, one that strictly observes the fundamental liberties embodied in the Treaty.

ASECAP has very major reservations regarding a new legislation on concession as it might deprive the current situation and affect efficient and transparent procedures that have been successfully used to set up the concession model and to finance major infrastructures projects involving high-level technologies.

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<sup>1</sup> COM(2005) 569 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions.

However, if the Commission was to decide that a new legislation on concession contracts should be adopted, ASECAP sees as a strong imperative to give proper consideration to the specificities of the domain in the different EU states.

The purported advantages should be:

- the embodiment in secondary legislation of the community law requirements to open concession award procedures to competitive bids;
- the contribution to further legal security;
- a uniform strengthening of Treaty enforcement throughout the EU territory.

In this perspective, ASECAP would encourage the European Commission and all the EU institutions to adopt a “**clarifying approach**” rather than a restrictive one and to preserve a specific and adequate legal framework for concession contracts. It is crucial to the concessions world to **maintain the necessary degree of flexibility for public and private partners allowing them to identify the most adequate means to achieve their objectives.**

ASECAP invites the EU legislative Bodies and Institutions to guarantee - throughout Europe - compliance with the principles of equal treatment, non discrimination and transparency, while ensuring respect of confidentiality and intellectual property. In addition to the above, the EU action should help to set a limit to the possibilities for unilateral alteration of the contractual position as far as they might affect competition and transparency; last but not least, the EU should establish a list of best practices & concepts underpinning the various types of PPP found in Europe.

ASECAP underlines that changes in the existing systems should be considered only when and where needed. In this pre-legislative phase, attention should be paid to the three following key elements:

**1) Contract awarding procedures:**

On this first point, one must consider the link that the Commission seems to be establishing between the “possible complexity of the concessions” and “the need for negotiation”.

In the field of service concessions, the perennial complexity appears to be characterised, notably, by the following elements:

- quality requirements in terms of the service offered to citizens;
- the need to adapt to the demands of public authorities;
- the issue of transfer of responsibility and the corresponding risks in a tripartite relationship between the public authorities, the contractor and the citizens who directly or indirectly benefit from the service.

Based on road concessionaires’ experience, the need for negotiation lies essentially in the importance for future contract signatories of studying in depth the spirit and practicalities of their cooperation, clearly defining each party’s responsibilities.

To that respect, ASECAP invites the Commission not to take measures which would be detrimental to consolidated procedures, such as “open tendering” and negotiated procedures”, by establishing “competitive dialogue” as the EU default procedure for contracts negotiations. “Competitive dialogue” is indeed considered to be too much restrictive by private operators and enough flexibility should be maintained in order for both the public and private partners to efficiently address the complexity and nuances of concessions projects. In addition, ASECAP members fear the “competitive dialogue” procedure might prove counterproductive since the private actors fear that their bids could be simply used as consultative proposals by their prospective client (public authorities) and/or that the client simply takes the best elements from all the bidders before making a composite solution and issuing invitations for the best and final offers.

## 2) **Contract adaptation over a period of time:**

The need to be able to adapt contracts during their lifetimes stems from at least two main factors:

- the complexity of missions, which is not always manifest at the contract award stage but rather during its execution, and leads to a situation where changes in the economic context are liable to affect the initial economic balance and the sharing of inherent operating risks;
- the impact of new safety, sustainability or health standards/requirements introduced by public authorities that are not party to the concession.

### 3) **Contract duration:**

With respect to contract duration, two cases should be distinguished:

- in work concessions involving high up-front investment, it is logical to assess contract duration in relation to the amortisation and redemption of the outlay;
- this logic does not apply in the case of service concessions.

The ability to deliver performance and optimal quality levels to public authorities and consumers requires that operators carry out studies, analyses and develop detailed knowledge of the service and the infrastructures for which they are responsible. This intangible investment, while hard to evaluate financially, must guide the definition of optimal contract duration.

Conversely, a short-term vision can only lead to a likewise short-term management of the service, and this means lack of progress for users and often long-term deterioration of the infrastructures, the cost of which ultimately lands with the authorities.

Again, a certain degree of flexibility is needed for interested parties to be able to adapt and extend the duration of the contract, while when “substantial” modifications intervene, other alternatives can be envisaged.

ASECAP wishes to express once again its willingness to provide accurate information and put its know-how at the disposal of the European Commission. ASECAP is ready to help EU decision-makers in their effort to identify the crucial issues at stake, and solve open issues such as the **definition of concessions** and related characterizing elements (transfer of risk, right of exploitation, remuneration), the possible calculation of **thresholds**, as well as the pro and cons inherent to each **awarding procedure**.



***European motorways concessionaires – a pioneering and socially-oriented industry in terms of PPP schemes – have long been advocating for a clear recognition of the crucial role of the private sector in improving delivery of projects, ensuring better value for money, boosting innovation and sustainability. Although pressure on public finances is particularly high in times of crisis, public budgets scarcity has proved to be a constant constraint in the past decades.***

***The EU's commitment must, therefore, be driven by the long-term aspiration to ensure financial and legal sustainability for a harmonious development of PPP projects.***

***Concessions schemes have already delivered efficient, safe and intelligent transport infrastructure in many EU member states and regions leading to a sustainable growth. A common – monolithic legal framework covering all the 27 EU states is not necessary because –although may be needed for states without “history” in the concessions world- it will threaten to be counterproductive in member states where all these years concessions have worked with great success.***