

CONCESSIONS WITHOUT THE OBLIGATION TO PAY A CONCESSION FEE: THE CROATIAN CASE

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ABSTRACT

Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts has significantly altered the legal nature of concessions within the European Union. A concession is now simply defined as a contractual form. Furthermore, the Concession Directive provides the freedom for member states to independently determine the services they consider to be of general economic interest, including the methods of their organisation and funding, in accordance with EU law. The Directive grants extensive powers to member states to regulate concessionary relationships under national law; thus, the Republic of Croatia has addressed this issue with the Concessions Act of 2017. Typically, a concessionaire pays a fee upon receipt of a concession, which may be monetary or may include the transfer of ownership over constructed facilities upon the concession's expiration. However, a pertinent research question arises – how should public interest be addressed when a feasibility study indicates that an activity via concession is non-commercial? For example, certain activities that are commercial in major European ports might not be commercial in smaller Croatian ports. The Croatian Law on Concessions allows, as an exception, concessions without the payment of a concession fee – yet such an exception is legally and politically very sensitive and must be adequately justified. This article aims to investigate the conditions and justifications for awarding concessions without a concession fee, focusing on the implications for smaller ports in Croatia.

KEY WORDS

concessions, concession fee exemptions, public service, non-commercial activities, innovative industries concessions

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INTRODUCTION

Concessions, in a broader sense, as a form of licenses whereby a sovereign permitted certain individuals to utilise his assets, trace their origins back to Roman law [1], with modern economic concessions having developed as early as the 19th century [2]. The second decade of the 21st century marked a renaissance in the application of concessions in Europe – they were unified at the level of the European Union, allowing for their extensive application across various sectors. The impetus for this significant shift in the concession model was driven by the economic crisis that began in 2007 [3], during which the European Union, as the state budgets of its member and candidate countries were affected by the crisis, sought to develop a model that enables private financing of infrastructure development, as well as the provision of numerous activities performed as public services. One of the methods of engaging private capital instead of direct budgetary investments was through concessions. Legal theory does not uniquely define concessions, but broadly speaking, in the legal evolution of concessions, we can distinguish two phases. Prior to the drafting of the first working documents that informed the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Concessions Directive) [4], concessions were generally defined as permits to perform an activity conditioned by special approval [5]. According to classical theory, a concession was an act – variously named a grant, authorisation, or permit – issued by a state authority allowing citizens of that state, another state, or foreign nationals to perform certain activities, which are generally reserved by the state for individual licensing [6]. Substantively, a concession forms a special legal institution whereby public authority permits a designated entity, whether a natural or legal person, domestic or foreign, to use or exploit certain goods, perform certain works, or engage in specific activities [7].

With the European Union's decision, based on an Impact assessment by the Commission, to standardise the legal framework for concessions across the EU, there was a significant departure from the prior definition of concessions as acts of public authority distributing certain rights. Preceding documents to the Concession Directive noted that concessions are partnerships between the public sector and mostly private companies where the latter exclusively operate, maintain, and develop infrastructure (e.g., ports, water distribution, parking garages, toll roads) or provide services of general economic interest (e.g., energy, water, and waste disposal) [8]. Additionally, concessions are the most common form of Public-Private Partnership (PPP). The need for reform and emphasis on PPPs was undoubtedly catalysed by the global financial crisis of 2007-2010 [9][10], during which many countries found themselves unable to fund infrastructure projects through budgetary means alone, necessitating private financing. Even prior to this economic crisis, there were significant investments, for example, in port infrastructure, that states could not support independently [11]. The application of PPP further complicates the process of awarding concessions due to additional specific rules [12].

Another important reason for harmonising concession regulations, as stated in the accompanying documentation, was that “This loophole gives rise to potentially serious distortions of the Internal Market, such as direct awards of contracts without any competition (with associated risks of national favouritism, fraud, and corruption) and generates considerable inefficiencies” [8].

The proposal for the new Directive was published in 2011 [13], and the Concession Directive was adopted in 2014 with a two-year deadline for the adaptation of national legislation. The Directive not only significantly changed the legal nature of concessions but also the manner of awarding them – concessions are typically awarded through a public procurement process, already well-developed within the legal framework of the European Union. The Republic of

Croatia (from now on Croatia) enacted its Concessions Act in 2017 [14], slightly after the deadline set by the Concession Directive.

In the Croatian Concessions Act, a simple definition of a concession is provided: “A concession is a right acquired through a contract” (Article 3). As seen, the legal nature of concessions is significantly simplified compared to classical definitions. Croatia has further categorised concessions into three types: 1) concessions for the economic use of general or other goods; 2) concessions for works; and 3) concessions for services. (Article 3) Special emphasis on “general or other goods” was introduced mainly due to the maritime domain, which constitutes a third of the state’s territory. It should be noted that the designations “public works” and “public services” from the previous legislation, the Concessions Act of 2012, have disappeared [15]. This has allowed the state and entities authorised to grant concessions much greater freedom in awarding concessions that are not limited only to public works and public services.

The Croatian Concessions Act explicitly states the subsidiary application of public procurement procedures in awarding concessions. As prescribed by the Concessions Act: “Preparatory actions are conducted by the concession grantor in accordance with this Act, special law, regulations governing public procurement, and other regulations depending on the type and subject of the concession” (Article 14).

The concessionaire typically pays a fee for the concession. They have been granted the right to perform a certain activity by a public law body. For this right, they pay an annual amount, which has significant public giving implications in Croatia. Public giving means that this giving is regulated according to a special regulation and falls under the jurisdiction of the tax authority (in case of non-payment of the fee, the state has at its disposal all instruments as in the case of non-payment of taxes) [16]. However, as we will elaborate further in the text, it is possible to grant concessions without paying a concession fee as an exception to the general rule. Such concessions must be detailed and precisely justified – these are cases where the concessionaire is thus exempted from a fee which is legally equated with paying taxes and similar dues. Every such exemption must be detailed and precisely justified.

The possibility of granting concessions without a concession fee is stipulated in the provisions of both European and Croatian national law. Such concessions are more prevalent in European Union countries with large, sparsely populated areas, such as Croatia [17]. In these regions, it is necessary to reconcile the public interest in providing certain public services with the financial interests of the concessionaires. In practice, these concessions can give rise to significant concerns, including suspicions of favouritism towards the concessionaire. It would be detrimental to discontinue the provision of public services due to doubts regarding the use of the option to grant concessions without a concession fee. This would deprive demographically sparse areas of various public services, making them even less attractive for living and working. Therefore, this article seeks to elucidate how such concessions are feasible and the prerequisites that must be met, particularly with regard to a feasibility study, to ensure that such a concession is not only legally viable but also transparent and free from potential legal and political ambiguities.

Therefore, in the next chapter, we will analyse this process because it is crucial to answer the question we have posed: When are concessions without paying a concession fee possible and permissible? Subsequently, we will analyse the prerequisites that must be demonstrated in the documentation for granting a concession to deem such a concession justified, with particular emphasis on the feasibility study. Finally, we will present a practical case study – small inland navigation passenger terminals in Croatia – as well as the potential use of such concessions in innovative industries where it is not possible to precisely calculate the value of the concession and the potential earnings of the concessionaire.

PREPARATORY ACTIONS FOR AWARDING A CONCESSION

The Croatian Concessions Act states in Article 14 that preparatory actions for awarding a concession are all activities conducted to grant a concession and precede the start of the concession awarding process [18]. Further, it states that preparatory actions particularly include: 1. the appointment of an expert committee for the concession; 2. the preparation of a feasibility study for awarding the concession or analysis of awarding the concession; 3. the assessment of the concession's value; and 4. the preparation of documentation for bidding (Article 18) [19].

For our analysis, the feasibility study for awarding the concession is particularly important. The feasibility study considers the public interest, environmental impact, protection of natural and cultural goods, financial effects of the concession on the state budget of Croatia or the budget of local and regional (territorial) self-government units, and compatibility with economic development plans, spatial plans, and concession awarding plans (Article 18) [20].

The feasibility study for awarding a concession consists particularly of an executive summary, a general part, technical, financial, economic, and legal analysis, and, if necessary, an environmental protection report according to a special regulation or assessment of acceptability for the ecological network where applicable, cultural goods and health, and associated appendices, conclusions, and recommendations (Article 19). The same article further specifies, among other things, that the executive summary of the feasibility study for awarding a concession contains a description of the subject matter and purpose/objective of the concession. The same article precisely defines how the financial and economic analysis of the feasibility study for awarding a concession particularly includes an analysis of the costs and benefits of the concession in relation to the budget of the concession grantor, i.e., the state budget of Croatia and/or the budget of the local and regional (territorial) self-government unit, and the financial feasibility of the concession in relation to the concessionaire in accordance with professional standards and international standards. It should also be mentioned that for concessions of lesser value, a somewhat simpler analysis of awarding the concession may be prepared (Article 19) [21].

Based on all these data, the value of the concession is assessed, which is regulated by Article 20 of the Croatian Concessions Act. The estimated value of the concession is calculated as the estimated total revenue excluding value-added tax, which the concessionaire, acting with the care of a good businessman, will achieve based on the concession contract for the duration of the concession. The estimated value of the concession is calculated using an objective method established in the bidding documentation in accordance with a special law. The estimated value of the concession is calculated based on data from the feasibility study for awarding the concession [22].

AWARDING A CONCESSION WITHOUT A CONCESSION FEE

The issue of the concession fee is regulated by Article 57 of the Croatian Concessions Act [23]. It states that the concession fee has the significance of public giving and is paid in money but can be agreed upon as a constant equal amount and/or as a variable amount depending on the specifics of the concession subject, principles established by the feasibility study for awarding the concession or the analysis of awarding the concession, and special law [24]. However, there is one exception described in the same article, which states that exceptionally, a concession fee does not have to be agreed upon in cases where the feasibility study for awarding the concession or the analysis of awarding the concession has determined that it is not financially justified unless otherwise regulated by a special law. (Article 57) This exception elaborates on recital 11 of the Concession Directive, which reads: "Concessions are contracts for pecuniary interest

by means of which one or more contracting authorities or contracting entities entrust the execution of works or the provision and management of services to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment”.

Article 57 of the Croatian Concessions Act also outlines the criteria for determining the amount of the concession fee. It prescribes how the amount and method of paying the concession fee are determined depending on the subject of the concession, the estimated value of the concession, the duration of the concession, the risks and costs that the concessionaire assumes, the expected profit, the scope of the concession, the equipment and value of the property or equipment and area of the general public or other good of interest to Croatia that is given in concession.

What are the cases where the concession fee amount does not need to be agreed upon? Concessions in Croatia can be given for various activities. The Concessions Act lists a total of 23 activities, emphasising that this listing is exemplary (thus, it is possible for other activities as well). A concession can thus be given for the exploitation of mineral resources, the use of waters, the right to hunt in state hunting grounds and game farms, on maritime property, in the area of nature protection, in the energy sector, for conducting activities of maritime and river transport, for providing public transport services, in the sports sector, in the health sector, for free zones, for aquaculture and other marine organisms, in the field of veterinary public health, and other activities [25].

PREREQUISITES FOR AWARDING A CONCESSION WITHOUT A CONCESSION FEE

The description of the subject matter and purpose/objective of the concession is part of the executive summary of the feasibility study for awarding the concession. When discussing which concessions could be granted without agreeing on a concession fee, it is necessary to start from that – the objective of the concession. It would be difficult to justify a concession for the exploitation of mineral resources, hunting rights, mariculture, or the energy sector without a fee because these are purely commercial activities from which the state wants to derive revenue. But what about organising public transport in less populated areas? Exploiting waters for irrigation, which makes some deserted areas agriculturally interesting? A veterinary clinic on an island where, even without paying a concession fee, it would be marginally profitable?

There are activities for which there is a public interest, and for various reasons, they do not have to be commercial. Additionally, the same activity may be commercial or not, depending on the circumstances; for example, port towing is considered very profitable in large Western European ports. Still, it is difficult to find interest in performing this activity even without a fee in a smaller Croatian port. Port towing is mentioned as an example because it represents an extremely important activity in ports (it can be mandatory), and the success and continuity of performing this service require significant resources. and such a technologically and capital-intensive activity requires, on the other hand, continuity of demand for its performance to ensure its justification [26]. A similar example can be given from the field of public passenger transport – a country that generally loses population, such as Croatia, also sees a decline in interest in public passenger transport [27]. Since there is a justified public interest in performing public transport, it makes sense to grant a concession without paying a concession fee. Moreover, local governments can also subsidise such services, which is also allowed by the Croatian Concessions Act in Art. 20. “If the concession grantor anticipates rewards or payments to the future concessionaire in accordance with a special law, it takes them into

account when calculating the estimated value of the concession”. The task of public law bodies is to ensure public services to citizens even when they are not profitable.

The first condition for awarding a concession without a fee, therefore, is the existence of public interest. Clearly, suppose a concession is defined as a right acquired through a contract. Why would the state (or another public entity to which the right to grant concessions has been transferred) grant a concession without a fee if there is no public interest? Public interest, or determining what constitutes public interest, is a topic that has been written about for centuries, and definitions are very diverse [28]. Almost anything can be justified as a public interest [29], so when we talk about public interest in the context of awarding concessions, we need to be very precise to prevent even suspicions of abuse where a potential concessionaire might be unjustifiably “forgiven” for paying the concession fee.

When preparing a feasibility study for a concession where, due to public interest, a concession fee is not charged, it is necessary to state the source of that public interest precisely. This can be a regulation that declares an activity to be of public interest. For example, public road passenger transport in Croatia is declared a public interest by the Road Transport Act [30]. It should be noted that some EU member states, such as Spain, began applying the concession model in public road transport as early as 1997 [31].

In Croatia, public interest is often explicitly stated in regulations that govern the management of public or common goods [32]. Public interest can also be an activity that is essential for performing some other activity of public interest, such as collecting waste from ships in public ports. Public interest can also be declared by an act of a public law body (for example, a decision of the Parliament, Government, county assembly, or others).

We could not accept that the feasibility study for awarding a concession itself concludes that something is “public interest” without referring to a regulation or other document. The declaration of public interest is a matter for a public law body, preferably a representative body, Law, or special decision, not a team that prepares the feasibility study for awarding a concession.

The second condition we mention is that the operational risk must not be a reason for awarding a concession without a fee. The Concession Directive states in recital 18: “The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of an economic nature involving the possibility that it will not recoup the 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 application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss by guaranteeing a minimum revenue equal or higher to the investments made and the costs that the economic operator has to incur in relation to the performance of the contract”. This is very clearly conveyed in the Croatian Concessions Act, which in Article 3 states that awarding a concession for works or services includes the transfer to the concessionaire of the operational risk in exploiting those works or services, which includes the risk of demand or supply or both. The transfer of part of the operational risk implies actual exposure to market changes so that any potential estimated loss suffered by the concessionaire is not symbolic and negligible. Further, the same article explains in detail how the operational risk is considered the risk of the concessionaire’s exposure to market conditions in such a way that the concession grantor does not guarantee that the concessionaire will indirectly or directly recover the invested funds or costs incurred in performing the works or providing the services that are the subject of the concession under normal operating conditions. This very strict limitation was introduced so that public law bodies would not guarantee profits or assume losses of the concessionaire, which can lead (and

sometimes has led in the past) to irregularities, as evidenced by examples worldwide [33]. The Impact Assessment, based on which the Concession Directive was introduced, noted: “Indeed, by transferring the main operating risks to a private partner and alleviating the public authorities of this burden, concessions make it possible, in certain cases, to carry out much-needed public works and services while keeping the corresponding commitments out of the government balance sheet” [34].

The third condition for awarding a concession without a fee, of course, is that the feasibility study for awarding the concession shows that the revenue from the concession would not be sufficient to charge a concession fee. This involves the part of the feasibility study for awarding the concession that contains the financial and economic analysis of awarding the concession. According to the aforementioned Article 19 of the Croatian Concessions Act, the financial and economic analysis of the feasibility study for awarding the concession particularly includes an analysis of the costs and benefits of the concession in relation to the budget of the concession grantor, i.e., the state budget of Croatia and/or the budget of the local and regional (territorial) self-government unit, and the financial feasibility of the concession in relation to the concessionaire in accordance with professional standards and international standards.

In the case of a concession without a concession fee, the criteria on which the concession grantor selects the most favourable offer cannot be based on the amount of the concession fee but on other criteria such as quality, operational costs and management costs, cost-effectiveness, service and technical support after delivery, delivery date, and delivery or completion deadlines, the price of the service for end-users, as prescribed by Art. 35 of the Croatian Concessions Act.

CASE STUDY OF A CONCESSION WITHOUT A FEE IN THE EXAMPLE OF AN INLAND WATERWAY PASSENGER TERMINAL

Nautical tourism on inland waters (inland waters include rivers and lakes) has emerged in recent years as a specific form of tourism that is attracting increasing interest from visitors in continental Croatia. In the counties along the international rivers Danube, Drava, and Sava, as well as smaller rivers like Bosut, infrastructure projects are underway with the primary goal of creating the prerequisites for the development of nautical tourism.

With the existing natural basis, the basic prerequisite for the development of all types of nautical tourism is the appropriate infrastructure for vessel docking and the boarding and disembarkation of passengers, which is provided at inland waterway passenger terminals. A terminal, according to the Navigation and Ports of Inland Waters Act [35], is the water part and the directly connected land area that is intended and equipped for docking, anchoring, and protecting vessels, loading, unloading, transshipping, and/or storing cargo, and/or boarding and disembarkation passengers. Unlike ports, where a wider range of port services is performed, terminals serve to perform individual port services.

According to the same law, port authorities and public institutions are responsible for ensuring the permanent, uninterrupted, and continuous performance of port activities in public ports and terminals. Port activities in public ports may be performed based on a concession. We note that under the broader term, port activities include port services and economic activities that are provided and performed in the port area.

When we talk about passenger terminals, two main types of port services are primarily performed: the berthing and unberthing of vessels, the reception and provisioning of vessels, crew, and passengers, and the servicing of vessels at anchorage.

The question arises if the capacity of berths at a smaller passenger terminal intended for excursion navigation is sufficient for the concession to provide the mentioned port services to be justified, given the current number of visitors in a smaller municipality in eastern Croatia, an economically underdeveloped area.

On the one hand, port services can only be performed based on a concession. The port authority, as the concession grantor, aims to entrust the organisation and supervision of docking, anchoring, and manoeuvring vessels at the terminal to an economic entity that will contribute to the improvement of the quality of port services through professional work. The port authority also has based on the Regulation on the Criteria for Determining the Amount of Port Fees in Inland Water Ports [36] and the decision on the number of port dues in ports and terminals made by each port authority for itself [37], secured revenue from port dues for the use of the shore/pontoon and fees for berths.

If, based on the analysis of the future concessionaire's revenue and costs, the legal prerequisites for calculating the concession fee are met, the port authority also acquires the right to a concession fee. The prerequisite for calculation is met if the economic-financial analysis of the feasibility study for awarding the concession shows that the estimated revenues of the concessionaire from providing port services are greater than the expenses incurred in providing port services.

The only basis for calculating the concession fee is the revenue of the concessionaire from port services charged based on the concession contract. At a smaller infrastructural passenger terminal, it is sufficient to provide only one commercial berth for the purpose of developing excursion navigation. Along with one commercial berth, another source of revenue for the future concessionaire is the revenue from accepting passengers in excursion navigation, which takes place during part of the year when weather conditions allow and is limited by the capacity of the vessels currently providing the excursion service, which is typically up to 30 passengers.

From the revenue from these two bases for calculating the concession fee, the future concessionaire will not be able to cover the operating expenses. Given that it is expected that the economic-financial analysis will show that the estimated revenues of the concessionaire from providing port services are less than the expenses incurred in providing port services, the concession fee should not be agreed upon because otherwise, no interested concessionaire would be found.

Therefore, the port authority, as the concession grantor, will ensure the sustainability of operations and financial stability by awarding a concession without a fee. Ultimately, at the terminal, this will ensure the provision of port services by an economic entity that will increase the safety and quality of services provided to end-users through professional work. For the future concessionaire, a financial-economic model will have to be devised to analyse the justification for awarding the concession from one case to another.

Unquestionably, such projects are of paramount importance for the development of new types of tourism and regional development, especially for the area of eastern Continental Croatia, which is among the least developed regions of Croatia [38].

CONCESSIONS WITHOUT CONCESSION FEES IN INNOVATIVE INDUSTRIES AND STATE-SPONSORED ACTIVITIES

As demonstrated by the specific example previously discussed, there are activities in which there exists a public interest in their operation. Yet, they do not generate commercial revenues sufficient to cover the concession fees.

A concession constitutes a public grant, and the obligation to pay concession fees is practically equated with tax obligations. The Croatian Concessions Act expressly stipulates in Article 82: “The Ministry responsible for finance shall collect concession fees from the concessionaire in accordance with the regulations governing the collection of taxes and other public dues”. This strict regulation, along with a special Concessions Register, was introduced following the 2012 Concessions Report, which highlighted serious shortcomings in the collection of concession fees [39].

However, like taxes, it is not always in the interest of collecting the highest possible concession fee. Take, for example, low-cost airline companies. Such companies negotiate with airport operators to obtain the lowest possible fees, offering in return an increased number of passengers. It is challenging for airports to compensate for the reduced earnings with the increased passenger volume [40]. Additionally, such negotiations can be quite stringent and border on the ethical limits of business dealings [41]. Despite this, the feasibility study for awarding concessions can justify cases where future concessionaires are required to facilitate access to low-cost companies (and to include this in the concession contract proposal), even if it means reduced revenues for the concessionaire and, thereby, a lower concession fee. Imposing the acceptance of low-cost carriers on the concessionaire is entirely appropriate and justified in tourist areas, as it is anticipated that tourists attracted by low airfares will spend money on accommodation, food, drink, cultural, and entertainment offerings. Thus, the state will largely compensate for the smaller earnings from concession fees through increased revenues in other ways.

The above example represents a case where it is opportune to limit the concessionaire’s earnings, and thereby indirectly the amount of the concession fee. The question arises of whether there are similar cases where it is reasonable and legally permissible to eliminate the concession fee. We believe there are and that the issue of paying concession fees should be considered more broadly economically.

One instance where awarding a concession without a concession fee may be opportune involves innovative industries [42]. For example, the new Croatian Maritime Domain and Sea Ports Act specifies that concessions are granted, among other things, for “the use of sea power for heating and/or cooling, the installation and use of solar/photovoltaic systems, and other innovative solutions relating to energy efficiency” [43]. Such installations do not yet exist on the Croatian Adriatic, are novel worldwide [44], and their profitability cannot be calculated in the feasibility study for awarding concessions. It is expected that years of research and optimisation will be required before the facility becomes profitable.

In innovative industries, the benefit to the state and the community lies in raising the technological level of society, the development of complex industries, and the arrival of highly qualified (and therefore well-paid professionals), who thereby pay high taxes and contributions on their earnings [45]. They will also need accommodation in the local community and will spend at least part of their income, thereby strengthening the local economy and paying taxes again [46].

Therefore, seeking the payment of concession fees for industries that are not developed to the level of established technology and whose profitability is not proven would not be opportune. An investor would choose another country to develop new technologies [47]. Here, the provision that does not allow the transfer of part of the operational risk to the concessionaire cannot be applied, as the profitability of innovative technologies (i.e., not of a specific business entity but entire technologies) still needs to be determined. If the concessionaire begins to operate profitably, they will inevitably pay taxes on their operations.

Another case where it may be justified to grant concessions without a concession fee involves activities significantly influenced by public authority and state subsidies, such as the case of the sale of electric cars. Chargers on highways will be profitable, and here, it is entirely justified to grant concessions with a fee. However, outside the main state roads, the profitability of chargers significantly depends on the number of electric cars in an area. And this number, in turn, depends on state subsidies. A recent German example shows that the elimination of subsidies for purchasing electric cars significantly affects the reduction of such car sales [48].

An undeveloped network of chargers can further worsen the sale of electric cars – in this case, it may be justified to grant concessions for chargers without paying a concession fee. In this instance, we also consider that there is no obstacle in terms of provisions prohibiting the transfer of part of the operational risk to the concessionaire, as the entire market significantly depends on subsidies, which are a political decision and can be introduced and revoked according to political will and the generosity of the state budget and specialised funds. The elimination of subsidies significantly affecting sales cannot be considered a business risk that the concessionaire must accept as an operational risk.

Similarly, concessions for new fuel chargers, such as hydrogen, should not only be exempt from concession fees but also financed from funds to find economic entities interested in their construction [49]. When discussing new ecological fuels, it is necessary to build filling stations so that cars using these new fuels can be used at all. Here, it is not opportune to charge a concession fee for an activity that will not be profitable for years, and possibly never, if technological development takes another direction.

In all these cases, it is necessary in the feasibility study to state and justify the public interest. For example, in this last-mentioned case, a hydrogen filling station in Croatia, this is the Croatian hydrogen strategy until 2050 [50].

DISCUSSION

The Concession Directive provides a great opportunity for autonomy in the national regulation of concessions, as stated in recital 6, which notes that member states or public authorities should remain free to define the characteristics of the service to be provided, including any conditions regarding the quality or price of the services, to pursue their public policy objectives.

Each state decides which services it considers public services – and their performance does not always have to be commercial. There may also be activities where direct benefits to the budget in the form of a concession fee payment are not expected. Still, indirect benefits are provided by enabling the strengthening of economic activity.

Passenger terminals on the rivers mentioned in our example are hardly financially viable on their own. The concessionaire cannot expect to be able to pay the concession fee. However, their existence enables the arrival of a larger number of tourists and numerous other activities related to tourism – from the sale of souvenirs to various catering services, the sale of food and drinks, and the accommodation of tourists.

In this instance, and in some other cases that we have mentioned (innovative industries and state-supported activities) [51, 52], it is both possible and justified to grant a concession without charging a concession fee. However, to prevent abuse of this provision, three cumulative conditions must be met.

The first condition is public interest. Public interest must be declared by a legal or similar act or decision of a public law body. As a rule, this should be a decision of a representative body because the issue of determining public interest is fundamentally a political issue, which is then put into practice by executive bodies that conduct the concession awarding process or other bodies such as public institutions, to which the powers to grant concessions have been transferred.

The second condition is that a study on awarding concessions, specifically the financial and economic analysis within that study, determines that there would be no interested concessionaires for a concession with a concession fee payment, or the service could not be provided with satisfactory quality.

The third condition is that exemption from the concession fee must not be a form of transferring part of the operational risk to the concessionaire, as both European and national legal frameworks prohibit such risk transfer.

Awarding a concession without agreeing on a concession fee is possible. Still, of course, it is an exception to the general rule. It must be thoroughly documented within the preparatory documentation in the concession awarding process, which refers to the legal basis by which the subject of the concession is declared to be of public interest.

CONCLUSION

In this article, we investigated the conditions and justifications for awarding concessions without a concession fee, focusing on the implications for smaller ports in Croatia. Our research highlighted the legal and political sensitivities associated with this practice and emphasised the importance of thorough justification and adherence to legal frameworks.

There is limited literature on this topic. The existing literature indicates that in certain locations, implementing a concession fee might not be practical, especially where demand for the service is low. Additionally, even if there is demand, there may be a lack of concessionaires with adequate capital, interest, or willingness to take on the associated risks [53][54]. However, these examples are not related to European practice following the adoption of the Concession Directive. Specifically, a large portion of recent literature dedicated to concessions, particularly in the transport sector, pertains to developed Western European countries where such constraints rarely occur – concessions are generally profitable.

The practical implications of our findings are significant for policymakers and practitioners in public administration. Understanding when and how to award concessions without a fee can help ensure that essential public services are maintained in non-commercial settings, thereby supporting regional development and public interest without compromising legal and economic standards.

The scope of our research was confined to the Croatian context. Thus, the findings may not be directly applicable to other EU member states with different legal and economic environments. Further research is needed to explore the long-term impacts of these concession practices on regional development and public service provision. The planned implementation of fee-free concessions at passenger terminals, which we have justified as an example in this article, can also be the subject of new, more specific research. Additionally, future studies could expand the analysis to include a comparative approach across various EU countries to understand better the broader implications of concession policies without fee obligations.

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