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Michele Cozzio, Gianfrancesco Fidone and Massimo Ricchi

EUROPEAN RULES FOR THE AWARD OF CONCESSION CONTRACTS ON THE INITIATIVE OF ECONOMIC OPERATORS (USP)

Contextual analysis and proposal for a common European legal framework

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Contextual analysis and proposal for a common European legal framework

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The Report was edited by **Michele Cozzio**, **Gianfrancesco Fidone** and **Massimo Ricchi**, developing the proposal for a *European framework on concession initiatives upon request by private operators* presented by PIARC Italia to the European Commission (February 2026).

Section 1.3, concerning the Spanish legal system, was prepared by **Ximena Lazo Vitoria**. Section 1.4, concerning the French legal system, was prepared by **Olivier Giannoni** and **Abel Quessandier**.

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The opinions and interpretations contained in the Report are solely those of the Authors and do not represent the official position of the institutions to which they belong.

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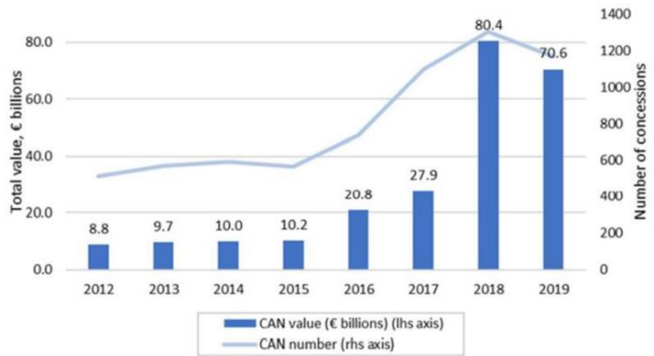
1. Background

1.1 The EU market for concession contracts

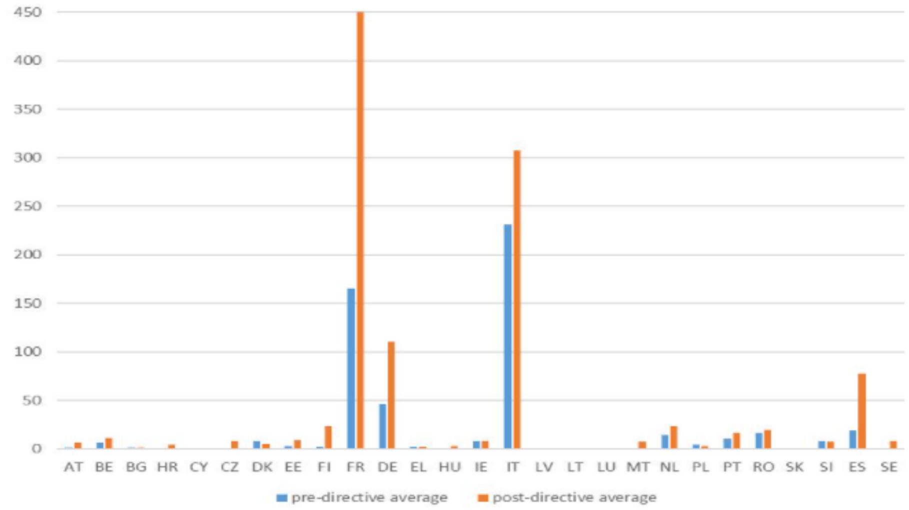
Data available at European level confirms the scale of the **concession contract market**: over EUR 377.5 billion between 2016 and 2021, **with figures continuing to rise**, particularly since 2016, the year Directive 2014/23/EU came into force.

The **average annual value** of these contracts is over **€63 billion.** This figure is an underestimate as it only includes contracts above the threshold (= of a value equal to or greater than €5,382,000). Concession contracts form the basis of key partnerships between public and private operators, often in **strategic sectors**, particularly for **infrastructure** development (ports and airports, car parks, toll roads and motorway maintenance, etc.) and for the provision of **services of general interest** (in the energy, hospital and waste disposal sectors, etc.).



EU Commission, *Report on the functioning of Directive 2014/23/EU*, 2023.

France and Italy account for over two-thirds of this market in the EU. Together with Spain and Germany, they account for 85% of total growth in the period 2016-2021. Countries such as Austria, the Czech Republic, Finland, Hungary, Croatia, Malta and Sweden are also making increasing use of concession contracts. The figure below shows the trend in concession contracts in Member States *before* and *after* 2016.



EU Commission, *Report on the functioning of Directive 2014/23/EU*, 2023.

Concession contracts are typically characterised by their high value, medium-to-long duration, complexity, and the transfer of operational risk to the concessionaire.

In 2014, the EU legislator adopted a directive on the award of concession contracts for the first time. This filled a gap in European public procurement law. The directive pursues **objectives of minimum harmonisation**, providing flexible rules aimed at improving market access and ensuring the transparency and fairness of award procedures.

Significant progress has been made in establishing a **common European regulatory framework**, yet **significant differences** remain **between Member States**.

For example, the term 'concession' is interpreted differently depending on the country and sector – sometimes equated with licences or authorisations – leading to **fragmented legal systems**. These discrepancies create uncertainty and high costs for the mobility of cross-border operators, who **cannot rely on unambiguous and uniform interpretations** of what constitutes a concession. This results in misunderstandings regarding the applicable rules, with repercussions for administrations and operators. Furthermore, with regard to operative risk, which is a key feature distinguishing concessions from public procurement, only a few Member States have adopted the definition set out in Directive 2014/23/EU; most Member States use different wordings, and some have omitted it entirely. These differences may lead to inconsistent treatment of similar contracts across the EU, potentially excluding them from the scope of the Directive and creating legal uncertainty.

Significant differences also emerge with regard to **Public-Private Partnerships** (PPPs), a broad category encompassing diverse types of relationships (contractual and institutional) that reflect the different legal traditions of the Member States. These **differences** are matched by an equal number of national regulations that relate to European rules on concessions in varying ways. The market values of PPPs in Europe are reported by the European PPP Expertise Centre (EPEC): the *2024 Report* records 39 completed PPP transactions with a total value of €11.47 billion (38 in 2023). **Greece** was the largest market in terms of value, whilst **Belgium** led the rankings by number of projects; **11 Member States** concluded at least one public-private partnership project (13 in 2023). **Transport** was the largest sector in terms of value. **Education** was the largest sector in terms of the number of projects. Over 61% of completed transactions involved government-funded public-private partnerships as 'cold' projects.

In many Member States, the award of **concessions on private initiative** (in Italy through «*finanza di progetto*») demonstrate the **potential of these processes** to drive investment, infrastructure development and projects in strategic sectors, generating efficiency and innovation – **a real booster** that complements initiatives funded by public resources. More generally, these solutions may contribute to the role of European procurement in promoting **innovation, resilience, sustainability and strategic autonomy**.

The ongoing reform of European public procurement law provides an opportunity to establish a **common procedural framework** for privately-led concessions, capable of ensuring **greater legal uniformity** and **certainty regarding the applicable rules**, to the benefit of operators and the public. The aim, therefore, is to establish a common legal framework that strikes a balance between safeguarding public interests and providing incentives for private initiative and the pursuit of the general interest.

In seeking this balance, **adequate incentives for operators must not be overlooked**. The pursuit of efficiency and results must be balanced against the principle of competition. Competition cannot be all-encompassing but must be balanced with other principles which – now more than ever – are recognised as having equal standing.

Moreover, the newly enacted European legislation is inspired by values (trade defence, economic security, resilience of production systems, strategic autonomy, preference for European goods and services) whose pursuit implies a curtailment of the principles of equal treatment, maximum openness and competition. These solutions are not isolated exceptions but represent – due to their significance, systematic nature and frequency – the driving forces behind the change that is redefining the traditional regulatory framework (based on openness and competition) in the pursuit of new balances.

The right of first refusal is just **one of several possible incentives that could be envisaged**. In international practice, project finance on private initiative, falling under *the category* of so-called Unsolicited Proposals (USPs), is frequently used to pursue innovative solutions within the context of complex contracts and objectives of general interest. Economic literature confirms that USPs, **through appropriate incentives**, generate efficiency and encourage innovative solutions without increasing costs for the Administration. On this point, economists' views are clear: granting preferential treatment incentivises private initiative, encouraging firms to invest resources and expertise in developing proposals of public interest, and the greater the preferential treatment, the stronger the incentive effect, hence the need to strike the right balance.

The most frequent incentives are:

a) **compensation for the costs incurred in preparing the proposal**, in the event that the promoter does not win the contract;

b) **bonus points** awarded to the promoter's proposal during the selection of the most advantageous bid;

c) the **right of preference** or **selective preference** (vested in the administration);

> The right of preference or selective preference is defined as an obligation for contracting authorities to **exclude bids**, **apply score adjustments, impose proportionate penalties**, or **impose eligibility restrictions**; or as a right of preference where the differences (particularly in price) between bids do not exceed pre-established percentage thresholds (e.g. Article 85(3) of Directive 2014/25/EU).

d) the **right of first refusal**, in the form of both the so-called «*right to match*» and the so-called *«Swiss challenge»*;

> In the *Swiss challenge* option, the original proposer does not participate as a normal competitor in the competitive process. Their proposal serves as the reference project for the tender, and competitors are invited to submit improved proposals. The original proposer decides whether to match the best proposal received by the contracting authority. The competitive process is structured from the outset around the original proposer's project, and all participants know from the start that the proposer holds a right to match and is submitting a competing bid.

The right to match option guarantees the promoter, during the award phase, the right to match the best competing bid and thus to be awarded the contract, regardless of whether their proposal is superior in terms of merit. In this sense, the Administration launches the competitive tender, evaluates all bids – including that of the promoter, who participates as a competitor – identifies the best bid and then activates the right to match in favour of the promoter within a predefined period. If the proposer refuses to match the best bid, they do not win the contract. This solution ensures greater competitiveness and transparency during the competitive phase, whilst encouraging the promoter to participate by further improving their bid.

1.2 The Italian project finance market

Italy has accumulated over two **decades of experience** in awarding **concessions based on proposals submitted by economic operators**, through «***finanza di progetto***». The **results achieved have been positive**, not only in terms of financial savings for public authorities but also in terms of the innovation and resources contributed by economic operators. It is recognised – in the words of the national legislature – that «*finanza di progetto* has taken on a role of **growing importance**, opening up a third way, as opposed to the dichotomy between works being financed entirely by the **public** sector or relying exclusively on the market, thanks to the use of **forms of public-private co-financing** implemented in line with the planning capacity of each public body».

In the Italian system outlined by the Public Contracts Code (Article 193, Legislative Decree 36/2023), the ***finanza di progetto*** defines the **procedure** for **the delivery of works and services proposed by economic operators to the administration and awarded through a concession contract. The proposing operator** is responsible for the design, construction and management of the project, as well as its **financing** through the raising of financial resources and the project's ability to generate cash flows. The investment is recouped primarily through revenues derived from the management of the works or service, rather than through direct public funding.

Under Italian law, the right of economic operators to promote their own initiatives in relation to public activities – through *finanza di progetto* – constitutes the implementation of the principle of **horizontal subsidiarity** (Article 118 of the Constitution). This form of cooperation proves particularly effective, **in terms of time and resources**, for the realisation of public interests and for enhancing the administration's *expertise* through the acquisition of new knowledge specific to the private sector. It also acts as an incentive for economic operators to invest.

National market data show the extent to which the awarding of privately driven concession contracts represents a concrete channel for **mobilising resources and projects**. One need only glance at the DIPE's annual report: as of 31 December 2024, **267 concession contracts** had been **awarded**, with a total value of **€29.5 billion**, an **average value per contract of €111 million** and an **average duration of 19 years**.

Of these 267 contracts, **170** (over 65%) were awarded **through project financing schemes,** a large share of which (112) pursuant to Legislative Decree 50/2016. These are contracts awarded through **«*finanza di progetto*» procedures initiated by the private sector, featuring the exercise (and use) of a right of first refusal**.

The data relate to contracts awarded by 31 December 2024. They are compiled in *the Report on the activities carried out by the DIPE in 2024 regarding Public-Private Partnerships and Project Finance* (June 2025) by the Department for Economic Policy Planning and Coordination (DIPE) within the Prime Minister's Office. The data is monitored via the digital platform of the State General Accounting Office. The award of concessions **on private initiative** accounts for 85% of all contracts where the subject matter involves investment (where the construction of infrastructure entails significant capital expenditure by the promoter) and exceeds 90% for transactions worth over €100 million.

Projects carried out in Italy have included: public lighting systems, public buildings, cemetery facilities and services, sports facilities, school facilities and services, healthcare and waste disposal facilities, car parks, social housing and port facilities and services, IT infrastructure, conference centres, military buildings, etc.

In this context, it is worth noting the ruling of **the Court of Justice of the European Union,** in its judgment of 5 February 2026 (C-810/24, ***Urban Vision SpA***) held that the **right of first refusal** granted to the promoter in privately-initiated project finance (under the Italian provisions of Article 183(15) of Legislative Decree 50/2016) **is not compliant with European law**.

The Court's judgment is causing quite a stir, especially in Italy where the right of first refusal in favour of the promoter has, until now, been the **main incentive for** the use of this scheme. It should be noted that during the **period 2007–2008**, when the right of first refusal was abolished and until its reintroduction, **private-sector initiatives came to a complete standstill**.

The judgment raises the question of whether it is appropriate to remove the right of first refusal permanently from the procedural options for awarding concessions at the request of private parties, or whether it would be preferable –

in light of the reform of the European public procurement rules – to subject it **to the necessary reconfiguration** within a procedure that recognises its legitimacy **in forms compatible with EU law** and consistent with the changes currently underway.

It should be noted that, as part of the reviews of milestone M1C1-73 *quinquies* of Italy's National Recovery and Resilience Plan, the European Commission (DG REFORM) has issued a **positive assessment of the national provisions on *project financing*** in the Public Contracts Code, as currently worded (following the amendments of 31 December 2024). The amendments were deemed: **(i) suitable for increasing the level of competition during the project selection phase, (ii) to strengthen the transparency of procedures, (iii) and to increase the contestability of concessions awarded through project financing**, as required by *the Council Implementing Decision*. In particular, the opening of the selection process to a variety of operators, the obligation to publicise the process, and the provision for a reasoned comparative assessment were considered, in the Commission's view, to be appropriate tools for ensuring greater efficiency in the allocation of public resources, thanks to a greater incentive for economic operators to participate - due to the reduction of potential information asymmetries that had arisen- and more effective protection of competition.

The **abandonment** of solutions that support the award of concession contracts through private initiative **does not appear to be the optimal solution**, particularly at this juncture in history when the need is to strengthen – at European level, not just nationally – the mobilisation of private resources and the capacity for intervention and innovation in strategic sectors. From this perspective, the critical issues identified by the Court (and the European Commission) can be regarded as **useful points of reference for improving the regulatory framework**, whilst at the same time building on solutions that have proven beneficial.

Cf. Ordinance No. 129 PNC of 28 May 2026, issued by the Extraordinary Government Commissioner *for the repair, reconstruction, assistance to the population and economic recovery of the territories of the Abruzzo, Lazio, Marche and Umbria regions affected by the 2016 seismic events*. The Ordinance addresses the urgent need to counteract the severe lack of bids in Public-Private Partnership (PPP) procedures launched by local authorities for the construction of Renewable Energy Source (RES) plants to be managed through Renewable Energy Communities (RECs) and financed by PNC funds. This situation followed the judgment of the CJEU (Case C-810/24), which declared the promoter's right of first refusal incompatible with European Union law, thereby requiring it to be disapplied. In this context, maintaining the reimbursement of expenses within the fixed ceiling of 2.5% would have compromised market interest, carrying the risk of freezing ongoing operations, requiring retendering, causing implementation delays, and undermining the achievement of the programme's public objectives, ultimately exposing PNC resources to the risk of loss or de-financing. To overcome this critical issue, the Ordinance introduces three key solutions:

1) **to reimburse expenses by means of a dynamic algorithm** governed by the parametric function $R(V) = 3.854 \times V^{0.7215}$, which determines the maximum recognizable reimbursement to the non-winning promoter in relation to the investment value. In the lower size brackets, this function restores the minimum conditions for the economic sustainability of the operation, progressively converging towards the legal threshold of 2.5% as the investment grows. According to the parametric study attached to the Ordinance, the

costs for preparing PPP proposals for REC projects are significantly higher than the fixed 2.5% ceiling in smaller-scale operations and decrease as the investment value increases, making the legal ceiling adequate again around the threshold of 72 million euros;

2) **to award a bonus score compliant with EU principles**, structured as a non-automatic incentive included in the qualitative evaluation criteria of the call for tenders and capped at a maximum of 10% of the overall assignable technical score, so as to reward exclusively the intrinsic merits of the proposal without reintroducing, even indirectly, the censured right of first refusal;

3) **to strengthen the confidentiality of the promoter's project documentation** by implementing appropriate measures to shield the most sensitive technical and economic elements from access by competitors, thereby preventing free-riding and preserving the value of the financial, technological, and managerial developments underlying the proposal.

It is true that project finance triggers a complex procedure and a **web of intricate relationships**, within which entrepreneurial initiative and the public interest must be balanced. In seeking this balance, as mentioned, **adequate incentives for operators are essential**. It seems anachronistic to prevent private individuals from proposing ideas and projects to the public administration, just as it is unrealistic to expect them to do so in the absence of incentives.

1.3 The Spanish market on concession contracts and the role played by economic operators[1]

Market-led proposals, or Unsolicited Proposals (USPs), concern concession projects or public-private partnerships that are originated not by the public administration, but by economic operators who propose the implementation of projects and initiatives. USPs reflect the principle that **the private sector can identify investment opportunities**, deliver technical solutions, or promote projects that are not included in public planning frameworks. Major international organizations–including the World Bank, the European Investment Bank, and the OECD–recognize the importance of such initiatives in fostering infrastructure development and innovative approaches.

Numerous Member States have regulated such initiatives within their public procurement or public-private partnership frameworks. In the case of Spain, the right to submit USPs is expressly provided for under public procurement legislation, which identifies specific economic incentives for the project promoter.

The judgment of the Court of Justice of the European Union of 5 February 2026, in Case C-810/24, *Urban Vision SpA*, addresses the compliance with European Union law of certain incentives granted to promoters within the framework of USPs. This ruling is of paramount importance for national legal orders that incorporate private initiative frameworks, particularly regarding the boundaries imposed on such incentives by the principles of transparency, equal treatment, and effective competition.

USPs within the Spanish legal framework

Private initiative within the framework of concession contracts boasts a **long-standing tradition in Spanish law**. A statutory precedent can be found in the *Ley General de Obras Públicas* (1877), which regulated private initiatives on a

[1] By Ximena Lazo Vitoria, professor of Administrative law at the University of Alcalá (Spain). Coordinator of the Research group on Green Public Procurement and Director of the Chair in Green Public Procurement.

general basis. Subsequently, the *Reglamento de Servicios de las Corporaciones Locales*, approved by Decree of 17 June 1955, incorporated private initiative mechanisms into the sphere of public service concessions. Finally, *Ley 8/1972* integrated this solution into the strategic sector of the construction, maintenance, and operation of highways under concession regimes.

A renewed impetus for USPs was provided by *Ley 13/2003* of 23 May, which regulates public works concession contracts. This legislation introduced **specific private-initiative mechanisms linked to the promotion of public works concessions**, allowing private parties to submit feasibility studies for potential concessions and granting certain economic benefits associated with their preparation. This **regulatory framework constitutes the most immediate precedent** to the regime currently in force. Taken together, these precedents reflect the **consolidation of a technique aimed at channelling the initiative of private operators within the framework of both works and services concessions**.

Current regulatory framework

Under the regulatory framework currently in force, private initiatives are governed by ***Ley 9/2017*** of 8 November 2017 on ***Contratos del Sector Público*** **(LCSP)**. This statute generally permits the conclusion of contracts concerning projects promoted by economic operators, thereby bringing them **within the scope of application of both works and services concessions.**

> See Article 28, entitled *Necesidad e idoneidad del contrato y eficiencia en la contratación*, paragraph 3 of which stipulates that: “In accordance with the principles of necessity, suitability, and efficiency established in this Article, **public sector entities may**, subject to compliance with the requirements established by law, **conclude contracts resulting from projects promoted by private initiative**, in particular regarding works concession and services concession contracts, including through the form of **mixed-capital companies**”.

Within the regulation of works concessions, the LCSP includes an explicit reference to USPs where it addresses the **feasibility study**.

The feasibility study constitutes a mandatory preparatory document in works and services concession contracts. Its purpose is to **analyze the technical, economic, and financial viability of the intervention**, identifying, *inter alia*, potential demand, investment and operating costs, sources of financing, risk allocation, and the projected profitability of the project. It serves as an **essential instrument to justify the recourse to a concession framework and to define the core elements of the future call for tenders**.

Article 247 (5), (*Estudio de viabilidad en contratos de obras*), provides that: «***Private initiatives are permitted for the submission of feasibility studies for potential concessions***. *Once submitted, the study shall be referred to the competent body so that, within a three-month period, it may either notify the private party of its decision on whether to proceed with its formal appraisal or set a longer examination period which under no circumstances may exceed six months. The silence of the administration or competent entity shall be deemed as non-acceptance of the study. In the event that the feasibility study leads to the award of the corresponding concession, unless said study proves insufficient for its intended purpose,* ***its author shall be entitled, in the relevant tendering procedure, to an additional 5 percentage points over and above those obtained through the application of the award criteria established in the tender specifications***. *Should the author* ***not be awarded the contract, they shall be entitled to the reimbursement of the expenses incurred for its preparation, increased by 5 percent by way of compensation***; *such expenses may be imposed on the successful concessionaire as a contractual condition within the relevant specifications. The amount of expenses shall be determined based on those proven to be justified by the party who submitted the study*».

The framework established by the aforementioned Article 247 (5), addresses two fundamental elements: **the procedural phase and the incentive granted to the private promoter.** In practice, the private initiative takes shape through the submission of a feasibility study by an economic operator, who is consequently granted a **competitive advantage in the tendering procedure** for the award of the concession: an additional 5 percentage points over and above those obtained through the application of the award criteria and, where applicable, the reimbursement of the expenses incurred for the preparation of the study should they not be awarded the contract.

For services concessions, no analogous legislation to that indicated above exists. The *Tribunal Administrativo Central de Recursos Contractuales* (TACRC) has adopted a **restrictive interpretive stance**, ruling that an extensive application of Article 247 (5) of the LCSP to services concessions is precluded (see Resolution No 303/2020 of 5 March 2020, Appeal No 1583/2019, and Resolution No 1300/2025 of 18 September 2025, Appeal No 1011/2025). Numerous scholars have criticized this approach.

The description of the legal framework is complemented by selected data retrieved from the *Plataforma de Contratación del Sector Público* (PLACE). It must be noted from the outset that the results are not exhaustive, as PLACE **does not systematically flag concessions promoted via private initiative**, a circumstance that hampers the retrieval of comprehensive information and the development of full quantitative studies. The data were obtained through searches based on explicit references to Article 247 (5) of the LCSP within the documentation, followed by a **case-by-case review** of the identified instances.

In the period **between 2018 (the year the LCSP entered into force) and the present day, 24 cases of concessions awarded following USPs were identified.** Of these, 23 correspond to concession contracts, comprising 13 works concessions (56.5%) and 10 services concessions (43.5%). The initiatives promoted are highly diverse, notably **university residences and elderly care homes**, which represent a significant proportion of the identified USPs. Furthermore, projects concerning **car parks** and **sports facilities** were presented. This legal instrument was also utilized for the management of **cultural facilities**, such as the *Teatro Madrid* or the *Teatro Chico Municipal*, as well as for specific **tourism infrastructures**, among which the *Altavista Refuge on Teide* is worth mentioning. Finally, albeit more sporadically, initiatives linked to **infrastructure for the provision of public services** (waste treatment facilities and desalination plants) were also identified.

From the administration's perspective, the utilization of USPs is primarily concentrated **at the local level** (20 initiatives, equal to 83.3%, compared to 4 initiatives promoted by public universities, amounting to 16.7%). As regards the outcome of the tendering procedures, the available data reveal that in 7 cases the contract was awarded to the promoter.

Despite the methodological limitations, the data support the conclusion that **recourse to USPs as provided for under the LCSP has been limited thus far**. Furthermore, a slight predominance of works concessions over services concessions can be observed. Finally, USPs are recurrent, above all, within local administration.

The CJEU judgment in Urban Vision and its potential impacts on the Spanish model

The first conclusion to be drawn from the *Urban Vision* judgment is that the Court of Justice does not call into question the compatibility of USP mechanisms with European Union law. The Court does not rule on whether or not an economic operator may promote a concession operation, nor on the legitimacy of national legal systems structuring specific procedures to implement this type of initiative. The subject-matter of the dispute is more circumscribed, as it concerns a specific incentive granted to the promoter (under Italian legislation).

Within the Spanish legal system, Article 247(5) of the LCSP does not grant the promoter a right of first refusal or an *ex-post* right to substitute the successful tenderer; instead, it provides a bonus score awarded *ex-ante* and known to all bidders from the outset of the procedure. This difference is not negligible from the perspective of the principles of transparency, equal treatment, and effective competition that underpin the judgment. However, the *Urban Vision* judgment requires an examination of whether the five percentage point bonus provided for by the LCSP complies with these principles and, in particular, whether such an advantage can be considered **proportionate to the contribution actually made by the promoter through the preparation of the feasibility study**. From this point of view, the compliance of the Spanish model hinges fundamentally on the appropriateness of the weight of the bonus points.

1.4 The French market on USPs: legal developments and new opportunities[2]

Under French public procurement law, **it is the responsibility of contracting authorities to identify and define the requirements to be met** through works, services, and supply contracts. This element characterizes the entire body of French regulation in this sector and is reflected in the authorities' power to design tendering procedures **based on autonomously assessed needs, rather than on initiatives spontaneously proposed by economic operators**.

> The French Public Procurement Code, in Article L. 2111-1, provides that «contracting authorities shall determine the nature and scope of the needs to be met, taking into account the objectives to be pursued, before launching any procurement procedure». **This provision constitutes a matter of public policy** (*ordre public*), **and its breach may result in the nullity of the contract**. See *Conseil d'État*, 10 May 1996, *Fédération Nationale des travaux publics*, No 145572, which reaffirms the obligation of prior definition of needs as a condition for the lawfulness of the procurement procedure.

An unsolicited proposal driven by private initiative – namely, a proposal whereby an economic operator, on its own initiative, submits to a contracting authority a project it intends to execute – challenges this premise. It **inverts the standard relationship between public demand and private supply**, leading the economic operator to identify the need to be met through the public contract. This inversion **creates a tension with the fundamental principles of public procurement** that French law has never truly resolved.

The only explicit attempt to incorporate a mechanism for unsolicited proposals into French positive law was introduced by the Ordinance of 17 June 2004 on **partnership contracts**, which are defined as contracts: «(...) whereby the State or a State public entity entrusts a third party, for a specified period determined in accordance with the depreciation period of the investments or the financing methods chosen, with a mission encompassing the construction or conversion, maintenance, operation, or management of works, equipment, or intangible assets necessary for the public service, as well as their total or partial financing, excluding any capital participation (...)».

[2] By Olivier Giannoni, Secretary General and Director of Legal Affairs of the *Union des Groupements d'Achats Publics* (UGAP), Adjunct Professor at Paris Panthéon-Assas University (France); and Abel Quessandier, PhD candidate in Law and Adjunct Professor at Paris-Est Créteil University (France).

The aforementioned mechanism allowed any economic operator to submit to a public entity a **project capable of being implemented in the form of a partnership contract as defined above**. As its scope was definitely modest in comparison with similar mechanisms abroad, **this framework fell victim to the questioning of the partnership model in France following the Senate information report of 2014**, prepared by Mr Sueur and Mr Portelli on behalf of the French Senate Committee on Laws.

> French Senate, Information Report No. 733 (2013-2014), Mr Jean-Pierre Sueur and Mr Hugues Portelli, on behalf of the Committee on Constitutional Laws, Legislation, Universal Suffrage, Rules of Procedure and General Administration, « *Partnership Contracts: Time Bombs?* », 16 July 2014. **The report sets out thirteen recommendations aimed at restricting the conditions under which partnership contracts may be used**, without specifically addressing Article 10 of the 2004 Ordinance, thereby illustrating the marginal place occupied by the unsolicited proposal mechanism within both doctrinal and parliamentary debate.

The codification of public procurement law, which classified the public procurement partnership contracts, confirmed the exclusion of unsolicited proposals from the scope of public procurement, in favour of a procedure in which the initiative is structurally vested in the contracting authority.

> According to Article L. 1112-1 of the French Public Procurement Code: «*A partnership contract is a public contract the purpose of which is to entrust to an economic operator or a group of economic operators a comprehensive assignment covering the construction, transformation, renovation, dismantling, or demolition of works, equipment, or intangible assets necessary for the public service, as well as all or part of their financing (…)*».

This choice cannot be considered definitive. The CJEU ruling in *Urban Vision SpA v Comune di Milano*, handed down on 5 February 2026, **opens up new perspectives on the European regulatory framework governing USPs in concession contracts**, prompting a reflection on how French law – as well as the ongoing revision of the European Directives – could, or should, adapt to these developments.

In the following pages, we will first examine how private-sector-led USPs were regulated and subsequently abandoned under French law (I), further noting that they remain a controversial mechanism, whose future acceptance in France faces obstacles that current European developments do not appear, at this stage, sufficient to overcome (II).

Endorsement and subsequent abandonment of the USPs in French law

French law provided for and regulated – for a certain period of time – procedures for the award of USPs, only to subsequently abandon them. The outcome of this evolution is the result not only of successive reforms over the years, but also of the profound divergence, if not incompatibility, between the logic of private initiative and the fundamental principles of French public procurement law.

Article 10 of the Ordinance of 17 June 2004 on partnership contracts **introduced, for the first time in French administrative contract law**, a procedure allowing any company or group of companies to submit to a public authority a proposal aimed at concluding a partnership contract. The submission of the USP was accompanied by an assessment setting out the advantages of resorting to a partnership contract, based on criteria of complexity, urgency, or economic efficiency, such as to justify a derogation from the ordinary rules governing public contracts.

> See Ordinance No. 2004-559 of 17 June 2004 on partnership contracts, published in the *Journal officiel de la République française* (JORF), 19 June 2004. Article 10, entitled 'Unsolicited proposals', provided that «any person may submit to a public authority a proposal aimed at the conclusion of a partnership contract». Regarding the context in which this mechanism was introduced, see F. Lichère & F. Marty, *Public-Private Partnerships in France: Assessment and Prospects*, in *Revue française de droit administratif*, 2014, pp. 1 et seq.

The public authority to which the proposal was addressed remained free to accept or reject it. If the authority deemed it admissible and decided to pursue it, **it was required to launch a tendering procedure for the award of the contract, without the economic operator who authored the proposal benefiting from any procedural advantage**, other than having originated the expression of the need. Unlike the Italian *project financing* regime censured by the Court of Justice, the 2004 Ordinance granted the proponent **neither a right of first refusal nor the possibility to match the successful tenderer's offer**. In this sense, it can be argued that the French Legislator had opted for the least disruptive version of the USP mechanism, decoupling the initiation of the proposal from the award of the contract.

The French solution provided no specific incentives for economic operators to offset the costs associated with developing the proposal, given that no guarantee of success or benefit in the subsequent competitive procedure was envisaged. Furthermore, it was quite evident that this solution was characterized by a non-negligible risk of information asymmetry, since the author of the proposal necessarily possessed a deeper knowledge of the project than its competitors, who could rely solely on the tender documents. **The only way to remedy this asymmetry was to fully disclose the initial proposal to competitors. Such disclosure was bound to be detrimental to the author, as it would reveal not only its strategic approach but also, potentially, the innovations incorporated into its bid.** The company thus risked losing any competitive edge and, even more seriously, suffering an inverse anti-competitive effect if it were ultimately not selected.

The procedure outlined in Article 10 of the Ordinance of 17 June 2004 did not find widespread application.

Its abandonment was the result not so much of a targeted reform, but rather of a broader distrust toward the partnership contract model, of which the USP constituted a complementary modality. In this regard, the report of the Senate Justice Committee of July 2014 comprehensively details the reservations and criticisms raised against the USP model.

Beyond the criticisms concerning the conditions governing the recourse to partnership contracts and the *ex-ante* assessment requirements, the rapporteurs highlighted the structural fragility of a procedural solution that concentrated the definition of needs, the design of the work, and the execution of the contract in the hands of the private contractor, to the detriment of transparency and the public authority's capacity for independent evaluation.

French Senate Report, cit., pp. 26-28. The rapporteurs underscore that «the partnership contract entails, in a certain sense, **a relinquishment by the public authority of its project ownership function**», and that *ex-ante* assessments are often «conducted more to justify a decision already taken upstream than to guide a future choice». On information asymmetry in partnership contracts, see also *Cour des comptes*, Annual Report 2014, «Public-private partnerships under the "Hospital 2007" program».

The mechanism provided for by Article 10 was therefore abandoned without having been subjected to any specific evaluation of its own merits. In this sense, it reflects an abandonment by omission rather than a reasoned rejection of USPs as such, a circumstance that consequently leaves unresolved the question of their compatibility with public procurement law.

This tacit phasing-out, however, prompts a more fundamental inquiry into the ability of the French legal system to reintegrate unsolicited proposals within a modernized regulatory framework – an issue that the recent 2019 codification process might have addressed.

Ordinance No. 2016-65 of 29 January 2016 on concession contracts, Ordinance No. 2015-899 of 23 July 2015 on public procurement, and ultimately the French Public Procurement Code, which took effect on 1 April 2019, **thoroughly overhauled the French legal regime governing public contracts, yet refrained from reinstating the mechanism** formerly enshrined in Article 10 of the 2004 Ordinance. **The current statutory framework** for partnership contracts under the Code **is devoid of any provision enabling an economic operator to present, spontaneously, a project earmarked for implementation**.

Such an omission seems deliberate. The *travaux préparatoires* of the codification fail to show any dedicated debate regarding the opportunity of preserving or restructuring the USP framework. The exclusion of this mechanism from the French Public Procurement Code may be construed as **an admission of its scarce practical viability or, more fundamentally, as a tacit policy decision to disallow the rationale of private-sector initiative within the positive law of French public contracts.** This reading is reinforced by the overarching architecture of the Code, which vests the contracting authority with the exclusive prerogative to delineate requirements, select the procurement pathway, and structure the bidding process, while offering no channel through which an economic operator might steer these phases upstream of the call for tenders.

A **narrow exception** resides in the **competitive dialogue** procedure, where the economic operator can assist in shaping the technical solution should the contracting authority lack the requisite expertise; nevertheless, even within this framework, such involvement remains strictly dependent on the administration's initiative and bound by its oversight during the negotiations.

The discarding of USPs during the 2019 codification process underscores a more deep-seated incompatibility. Article L. 2111-1 of the French Public Procurement Code, by reiterating the prerequisite of defining requirements beforehand, provides that **contracting authorities shall determine the nature and extent of the needs to be satisfied**, taking into consideration the objectives pursued, prior to initiating any tendering procedure.

This indication, which is both functional and legal in nature, underpins that **the definition of needs constitutes a unilateral act of the contracting authority**, which precedes and remains detached from any proposal originating from an economic operator.

Unsolicited proposals driven by private initiative would disrupt this sequence. When an economic operator submits a proposal before the public authority has defined its requirements, it is logically positioned to influence that definition, at least in part. This **influence** can take a **direct form**, if the public authority adopts the proposal as the basis for the tender specifications, or an **indirect form**, if knowledge of the proposal alters the contracting authority's perception of its own needs. **In either case, the boundary between the authority's definition of the need and its formulation by the economic operator becomes blurred**, to the point that the USP mechanism threatens the coherence **of a regulatory system founded on the separation between the phase of defining needs and that of satisfying them through competitive models**.

This structural incompatibility runs deeper than the financial or management criticisms included in the 2014 Senate report. Those criticisms primarily concerned the **excesses observed in the practice of partnership contracts** – biased *ex-ante* assessments, information asymmetries favoring large firms, and the rigidification of public budgets – **without questioning the very principle of private initiative within public contracts.** Conversely, the 2019 codification produced a more decisive closing effect, **leaving no room**

for unsolicited private-sector proposals within the architecture of public procurement law.

See Senate Report, cit., pp. 23-26. The rapporteurs observe that «the primary motivation for resorting to a partnership contract is in fact of a budgetary and financial nature» and that «insufficient consideration of the financial implications in public-private partnering contract equates to "a time bomb" for future generations».

USPs and competition in French law

The absence of explicit recognition for USPs in French positive law does not imply that private initiative is devoid of any form of legal expression within the broader framework of administrative contracts.

Various contractual arrangements exhibit functional affinities with unsolicited proposals, despite being grounded in a different underlying logic which, in the final analysis, confirms rather than contradicts the principled rejection inherent in French public procurement law. Furthermore, the perspectives opened up by recent developments in European Union law encounter structural obstacles that, as previously noted, the current state of French law does not easily allow to overcome.

The **partnership contract**, provided for by Article L. 1112-1 of the French Public Procurement Code, constitutes the successor to the previous partnership contract and does not recognize the USP mechanism. As an integrated contract that entrusts the economic operator with a global mission comprising the design, construction, transformation, operation, and financing of infrastructure or services, **the partnership contract is intended to meet complex needs, the definition of which remains entirely within the competence of the contracting authority**. The initiation of the procedure rests unilaterally with the public authority, given that it is the contracting authority that determines whether recourse to this contractual tool is appropriate, defines its conditions of use – typically based on considerations of complexity or urgency – and organizes the competitive procedure on the basis of functional specifications that it alone postulates.

The **urban development concession contract**, regulated by Article L. 300-4 of the Town Planning Code (*Code de l'urbanisme*), occupies a partly comparable space, as it entrusts a private party involved in implementing a development operation on behalf of a public authority with the transfer of part of the risks associated with the execution of the project.

Administrative jurisprudence has progressively subjected these contracts to the requirements specific to procurement award procedures, thereby narrowing the scope within which private initiative can express itself outside the framework of a competitive procedure. Nevertheless, the urban development concession contract can still be used to implement a **project whose outlines have been, at least in part, defined by the economic operator in the context of prior informal exchanges with the public authority** – a practice whose lawfulness remains uncertain in light of the rules governing the prior definition of needs and the principle of equal treatment of candidates.

Outside the sphere of public procurement, there are certain types of contractual arrangements characterized **by the fact that the initiative rests with the occupier of the public domain.** Public domain occupancy agreements, particularly when they take the form of **temporary occupancy permits for economic purposes,** allow an economic operator to request from the authority managing the public domain the grant of a title authorizing it to carry out an activity on public property.

In this context, the initiative is structurally private, as it is the economic operator that identifies a commercial opportunity, defines the project it intends to realize on the public domain, and requests the necessary authorization. The public authority has not previously articulated a need to which the agreement would respond; rather, **it confines itself to assessing the compatibility of the proposed project with the designated use of the property and the requirements of the public service**.

In essence, **this private initiative model mirrors the space that USPs currently occupy in the field of public contracts**. The distinction between the two logics lies in their respective purposes: a public domain occupancy agreement serves the objective of enhancing public assets, rather than satisfying a need of the public authority under public procurement regulations. As such, the agreement falls–at least in its most common forms–outside the application of the competitive bidding procedures specific to public procurement, although the jurisprudence of the Court of Justice and the provisions of Article L. 2122-1-1 of the French General Code on the Property of Public Entities, introduced by the Ordinance of 19 April 2017, now impose a prior selection procedure when limited resources or locations are involved.

Taken together, **these provisions do not delineate a coherent space for private initiative within the scope of public contracts**, but rather trace the boundaries within which such initiative is tolerated: namely, outside public procurement *stricto sensu*, within the sphere of public asset enhancement, and provided that this does not compromise the competition rules governing the allocation of occupancy rights.

Reintroducing USPs: a remote and conditional hypothesis

The judgment of the Court of Justice of the EU in *Urban Vision SpA v Comune di Milano*, delivered on 5 February 2026, primarily aims to define the limits of the right of first refusal granted to the promoter of an unsolicited proposal within the context of a concession procedure. In outlining these limits, **the Court implicitly delineates the conditions under which a limited recognition of private initiative can be compatible with European Union law**. The judgment does not definitively preclude any USP mechanism, but **rather clarifies the conditions** for its admissibility.

In the first place, **prior transparency** regarding the existence of **any incentive aimed at enhancing private initiative** must be guaranteed from the stage of the tender notice.

In the second place, the **prohibition on modifying tenders after the expiry of the submission deadline** is imperative in order to safeguard the principle of equal treatment.

In the third place, **maintaining a competitive procedure that is fully open and accessible to third parties** is indispensable.

Finally, **any advantage granted to the promoter: (i) must be proportionate to its actual intellectual investment and (ii) must not constitute a decisive factor in the award of the contract**. These conditions rigorously define the conditionalities for incentive structures for USPs that are compatible with Union law.

Their transposition into French law faces significant **obstacles**. The first is of a **constitutional and legislative nature**: the obligation for the contracting authority to define its requirements beforehand, enshrined in Article L. 2111-1 of the French Public Procurement Code and grounded in the constitutional principles governing the sound management of public funds, **is scarcely compatible with a procedure where the definition of those requirements is driven, in whole or in part, by an economic operator's proposal**. That being said, this obstacle could be overcome by placing the private proposal on a different plane from that of determining the contracting authority's requirements–requirements that would be conceived only subsequent to the submission of the project.

It could be argued that, if French law intended to align itself with the European dynamic suggested by the *Urban Vision* judgment, it should at least initiate a reflection on **three key issues**.

In the first place, **the link between protecting the intellectual investment of the USP promoter and the requirements of the tendering procedure**: the mere reimbursement of development costs, which is already permissible under positive law within the context of competitive dialogue procedures, could constitute a first step.

Secondly, the **definition of the categories of projects for which a specific procedure for receiving USPs could be established**, foremost among which are complex service concessions, large-scale infrastructure projects, and innovation partnerships.

Thirdly, **the legal status of the USP within the procurement procedure** – namely, whether such a proposal can serve as the documentary basis for an open competitive procedure, subject to the adoption of adequate guarantees for its author and appropriate transparency towards competing bidders.

At the current stage of French legislation and CJEU case law, these issues remain largely unresolved. The *Urban Vision* judgment established the minimum conditions under which mechanisms recognizing private initiative in concessions can operate without violating Union law. It is potentially up to the European Institutions to address this issue in the context of the upcoming revision of the directives and to propose a **regulatory framework capable of rethinking and revitalizing unsolicited private-sector proposals**.

2. Proposal for a European regulation

2.1 USP in support of the objectives of European reform

The European Commission has announced the presentation of ***the EU Procurement Act*** by summer 2026. In statements and policy documents, the **reform of the European directives** is identified as one of the **key points** for the revitalisation of the European economy.

Studies, assessments and consultations have accompanied the preliminary phase of the reform, **analysing the structure and functioning of the European regulatory framework** and **formulating proposals and solutions** to improve it and adapt it to changes. European rules are perceived as complex and not sufficiently flexible to support public investment objectives. The main demands focus on **more flexible rules** (particularly in market dialogue and implementation), **reduced administrative burdens** (by enhancing digital solutions), greater **incentives for innovation**, and **preferences** to strengthen European industry and supply chains.

In this context, the **proposal for a European framework for the USP** aims to encourage **the mobilisation of private resources**, **support innovation** and **the capacity** of operators (and their respective supply chains) to intervene in strategic sectors (particularly energy, healthcare and transport). Underpinning all this is the **advantage** of having a **common framework** capable of **unlocking the potential of a harmonised USP on a European scale**.

2.2 Structure of the proposal regulation

The proposed regulatory framework for USPs covers the stages from **the submission of the proposal and dialogue between the parties to the award** of the contract, whilst **the remaining stages** of the contract lifecycle are governed by the rules on concession contracts. The model is not based on direct negotiation between the parties (so-called **'negotiation'**), nor on opening up to competition in the market (so-called **'auction'**); rather, it is the result of **the sequential combination of both techniques**.

Firstly, it should be noted that PPP contracts, *the category* to which concession arrangements established via USP belong, are characterised by a **high degree of complexity and/or innovation**. The **pursuit of innovation and solutions to complexity** are the elements that, more than any others, should characterise USP initiatives. At the same time, in order to achieve these very same results, the limited alternative between 'auction-only' or 'negotiation-only' models proves to be a failure.

The **auction-only model** fails because it does not optimise the creative contribution of private parties. It puts a project out to tender whose contents are predefined by the administration; for this reason, innovation and solutions to complexity – which could otherwise arise from competitive bidding – are constrained within the limits of the proposal conceived by the administration.

At the same time, the **negotiation-only model** fails to achieve the objective of securing the best innovation and solutions to complexity, not only because of the limited scope of application permitted by EU law, but also because it is a process which, at best, 'pays blindly' – and therefore excessively – for the chosen innovation and solutions to complexity.

The conclusion reached is that, for the award of privately initiated concession contracts, the choice between auction or negotiation **does not allow the administration to maximise benefits in terms of costs and, above all, in the pursuit of innovation and solutions to complexity aligned with its own interests**.

We believe that the hybrid model – which we can define as **a 'negoauction'** (negotiation+auction) – represents **the ideal approach to the award** of concession contracts.

The first negotiation phase allows the market to demonstrate the innovation and solutions to complexity of which it is capable. The Administration must ensure adequate processing **times** and must guarantee remuneration for the efforts made **through economic incentives** (such as reimbursements or bonuses) and/or the **recognition of an incentive upon** contract **award**.

This is necessarily followed **by** a **second phase, the auction**, which allows other operators to engage in **competitive bidding** on the proposal (which has already been the subject of negotiation). Competitiveness should be valued as a solution, particularly **in terms of (lower) costs** and **design improvements**, capable of eliminating or reducing the risk of 'return pockets' embedded in the offer being negotiated.

The sequence of these two phases – first negotiation and then the auction – must be accompanied by certain **measures**, in the form of incentives or penalties, aimed at eliminating both barriers to entry and predatory behaviour driven by *moral hazard*.

The USP, structured in this way, follows a **spontaneous proposal put forward by the operator** to the Administration for the implementation of a project through concession contracts. As part of this procedure, the Administration must be able to use the tools to:

- **assess the proposal** received;
- **negotiate** it, in order to align it with its own interests;
- **put** the project **out to tender** to identify the concessionaire.

The advantages of the USP structured in this way compared to other types of award governed by the Directive concern: (1) the reduction of award times; (2) the submission of projects that have not been identified by the public administration; (3) the alignment of the project proposed by the private operator with the interests of the public administration, through the phase of cooperative negotiation between the parties; (4) the reduction of returns through a competitive and transparent procedure in the second phase; (5) the identification of projects validated from a technical, legal and, in particular, economic and financial perspective; (6) the stimulation and acquisition, if appropriately incentivised, of the best innovation available on the market.

2.3 Two models for the European regulation of the USP

Two alternative procedural approaches are described below, differing in terms of when competition is introduced into the award procedure – which comprises a negotiation phase and an auction phase – both of which begin with the submission of a USP by the economic operator.

First USP model

Negotiation phase: if competition is guaranteed at an early stage, competitive comparison is initiated in this first phase between the operator who proposed the initiative, thereby triggering the USP procedure, and any other competitors who have responded to the notice published by the Administration on the TED. The comparison proceeds in accordance with the OEPV formula.

> In this phase, the OEPV may be modelled on the basis of Article 41(3) of Directive 2014/23/EU: «The contracting authority or contracting entity shall list the criteria in descending order of importance». Moreover, «it is an established principle that the choice of criteria for evaluating tenders reflects **the broad discretion** granted to pursue the public interest; as such, it is subject to review only where it is grossly illogical, unreasonable and irrational, and the criteria are not transparent and intelligible. **This discretion is broad in the case of the award of concession contracts, the rules governing which are more flexible than those for public contracts, as concession-granting bodies are also permitted to indicate the evaluation criteria only in order of importance without the necessary weighting of** the **respective** scores» (Resolution of the Italian National Anti-Corruption Authority, No 49 of 10 February 2026).
>
> See recital 90 of Directive 2014/24/EU, which explains the reason for listing the criteria solely in order of importance: «[…] contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. Contracting authorities should, however, be permitted to derogate from that obligation to indicate the weighting of the criteria in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular because of the complexity of the contract. In such cases, they should indicate the criteria in decreasing order of importance».

The comparison results in a single promoter with whom the administration freely negotiates the proposal.

Auction phase: in **the** subsequent **competitive tender**, based on the proposal drawn up with the administration during the negotiation phase, the incentive of

the right of first refusal is maintained because the negotiation phase was the subject of a competitive process adequately publicised on TED.

In this phase, the anti-competitive nature of the right of first refusal is irrelevant because it has already been subject to competitive tendering; rather, this phase fulfils the other important function of reducing any economic rents.

In **the innovation partnership**, Article 31 of Directive 2014/24/EU, this 'efficiency-enhancing' phase is completely omitted; indeed, the selected operator will not only have to develop the project (the details of which are unknown as it is the subject of research) but will also be awarded the subsequent works: «Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase [...]» (see recital 90 of Directive 2014/24/EU).

Second USP model

Negotiation phase: competition is not introduced at the outset and the contracting authority negotiates the proposal only with the promoter who submitted it, without any competitive comparison.

Auction phase: in the subsequent competitive tender, the promoter **is always awarded a sum to cover the costs of preparing the proposal**. This reimbursement compensates the promoter, in full or in part, should they have to transfer the proposal to the winning operator, thereby preventing undue enrichment of the contracting authority. Furthermore, the procedure must grant the promoter an incentive from among those available, such as bonus points and/or others. These incentives must be identified by measuring and assessing their potential to interfere with competition in relation to the pursuit of other general interests protected by the Treaties.

Incentives may also include the right of first refusal or preference should these be granted in the event of a small difference in scores (e.g. 5% or 10%) between the winning bidder and the Promoter. In such a case, in fact, although there has been no prior competition for the right of first refusal, the incentive: a) is not granted in advance to the Promoter but is granted only if the margin is small; b) rewards the Promoter's position (who is normally more efficient in executing the project because they conceived it and therefore know it). The right of first refusal thus recognised differs from that criticised by the Court in the *Urban Vision* case, being comparable to the type of incentive provided by the bonus points.

The competitive dialogue is ill-suited to ensuring effective forms of cooperative and direct negotiation with the economic operator. This **proceduralised** system of **multiple negotiations** involving several competitors hinders the alignment of the proposal with the administration's interests.

The negotiation phase with a single operator lies at the heart of the USP procedure. Competitive dialogue does not encourage operators to submit innovative bids, as they are aware that the Administration disseminates *information* through the so-called *'cherry-picking'* of each competitor's innovations, with the aim of aligning the scope of the proposal prior to the participants' *best and final offer* (BAFO). It is intuitive, and supported by economic literature, that the most advantageous strategy for operators is to 'stand still' and not propose innovations, which are not only costly but would be made available to other competitors free of charge.

Furthermore, competitive dialogue is costly due to the amount of *sunk costs* generated during the procedure without any *chance* of a decisive comparison between competitors; finally, it is a procedure that is difficult for the Administration to manage, as negotiations with competitors must be tailored to each proposal, which may have varying degrees of *compliance* with the changes required to align with the Administration's interests.

3. Recitals and draft legislative provision

RECITALS

(●) It is appropriate to encourage the submission of unsolicited proposals (USPs) by economic operators, the implementation of which takes place through concession contracts. The promotion of operators' proposals implements the principle of horizontal subsidiarity and offers advantages for the realisation of public interests, to save time and resources as well as supporting innovation, resilience and sustainability, competitiveness, economic security and the strategic autonomy of the Union. There is considerable diversity across Member States in the rules governing the submission of proposals. This makes it appropriate to establish a harmonised legislation to ensure greater uniformity and legal certainty, cross-border mobility and the participation of small and medium-sized enterprises (SMEs).

Member States or public authorities shall encourage the submission of unsolicited proposals through appropriate incentives. Such incentives shall be set out in the tender documents.

(●) Public authorities may negotiate the content of proposals directly with the promoter or select the promoter through a competitive process. When the promoter is selected competitively, the public authority may grant a right of first refusal.

The procedures are divided into two stages.

The first stage is aimed at the negotiated definition of the proposal's content and serves to ensure: (i) alignment of the proposal with the administration's objectives and interests, (ii) verification of the reasonableness of costs, ensuring the feasibility of the operation.

The second stage involves putting out to tender the proposal negotiated with the promoter, in accordance with the regulations governing the award of concession contracts. In this stage, the administration may encourage the participation of operators by providing reimbursement mechanisms for the highest-ranked bidder who is not awarded the contract as a result of the incentives granted to the promoter.

ARTICLES

TITLE (●)

PROCEDURES FOR AWARDING CONTRACTS ON THE INITIATIVE OF PRIVATE ENTITIES

ARTICLE (●) – Proposals on private initiative

1. Contracting authorities and contracting entities may award concession contracts based on unsolicited proposals submitted by economic operators. Each proposal shall contain at least the project, the draft contract and the economic and financial plan.

ARTICLE (●) – Competitive selection of the promoter

1. Following the submission of the proposal, the contracting authority or contracting entity shall publish a notice on TED inviting alternative proposals.

2. The notice shall specify:

a) the subject matter and content of the proposals;

b) the criteria for evaluating the proposals. The contracting authority may list the criteria in descending order of importance, without the need to define the weighting and scores in advance;

c) the incentives for the promoter:

(i) the recognition of the right of first refusal, and

(ii) reimbursement of the costs actually incurred and documented for the preparation of the proposal, quantified in accordance with professional rates or market practice, should the promoter not be awarded the contract in the subsequent competitive phase.

3. The contracting authority or contracting entity shall enter into a phase of proposal negotiation with the selected promoter to align the proposal's content with the public interest, actual costs and its sustainability.

4. The contracting authority or contracting entity shall launch a competitive tender for the award of the contract on the basis of the negotiated proposal.

ARTICLE (•) – Direct negotiation with the promoter

1. Following the submission of the proposal, the contracting authority or contracting entity shall enter into a phase of direct negotiation with the promoter to align the content with the public interest, actual costs and its sustainability.

2. The contracting authority or contracting entity shall launch a competitive tender for the award of the contract on the basis of the negotiated proposal. The right of first refusal, or automatic adjustment of the tender is excluded. The promoter shall be granted a premium-based incentive.

3. A promoter who is not awarded the contract shall be reimbursed for the costs actually incurred and documented in preparing the proposal, calculated in accordance with professional rates or market practice. The contracting authority may set a percentage limit on such reimbursement, taking into account the type of premium-based incentive awarded to the promoter.