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European Commission

Subject: Possible infringement of Directive 2014/23/ EU on the award of concession contracts and Directive 2014/24/EU on public procurement by the Hungarian Government

Budapest, 5 July 2021

Dear Director Kiljanski,

On 9 June 2021, the newly established National Concession Bureau ('Nemzeti Koncessziós Iroda') published a [Concession Notice](#) in the Hungarian Electronic Public Procurement System. The [same notice](#) was published in Tenders Electronic Daily on 14 June 2021. The subject-matter of the concession award procedure is the design, renovation, construction, operation and maintenance of Hungary's controlled-access highway network (ca. 2000 km motorways and expressways).

In the present letter we would like to point out two concerns related to the planned concession. In our opinion both concerns possibly raise the serious infringement of Directive 2014/23/EU on the award of concession contracts (hereinafter referred to as Concession Directive) and Directive 2014/24/EU on public procurement (hereinafter referred to as Public Procurement Directive), therefore we would like to ask the Commission Services to examine the planned concession in question and assess its conformity with EU law.

The planned concession

It needs to be emphasised that we can only rely on the published Concession Notice, which only contains some very basic information; and on the information the Hungarian Government provided to the representatives of the media at a press event. We don't have access to the concession documents frequently referred to in the Notice. Based on the Concession Notice and the information provided by the Government, the specificities of the planned concession are the following:

- 1) The Contracting Authority is the National Concession Bureau established in September 2020 by Government Decree 424/2020. It is controlled by the Head of Cabinet of the Prime Minister (§1 of the Government Decree).
- 2) The subject-matter of the planned concession is the design, renovation, construction, operation and maintenance of Hungary's controlled-access highway network (ca. 2000 km motorways and expressways) and the financing of these activities. It includes existing network elements, as well as, elements to be constructed in the future.
- 3) The Concession Notice defines the type of concession as a services concession, however, regarding the subject-matter of the concession, it is a mixed, works and services concession.
- 4) The chosen concession award procedure is competitive procedure with negotiation.
- 5) The estimated value of the concession is EUR 7-8 billion – that is, above EU thresholds – according to [market experts](#).
- 6) The planned duration of the concession is 35 years. The Contracting Authority expects 10-year of investment.
- 7) The main award criterion is the price.
- 8) The financing of the concession is the most unclear element of the planned concession. According to the Concession Notice the main award criterion is the price, which comprises the 'availability fee' and the 'service fee based on availability' – the two together are called 'concession service fee' – and the 'additional investments tariffs'. While the Concession Notice does not clarify this, the Head of Cabinet of the Prime Minister [communicated](#) that (1) the above-mentioned fees would be paid by the Government to the Concessionaire; (2) the toll would *not* be collected by the Concessionaire; (3) the Government would be financing the availability fees from the tolls that it continues to collect, but the budgetary income originating from the toll and the state expenditure of the availability fee would be technically independent from each other. There is no indication whether the Concessionaire has any payment obligation.

The question of the definition of works and services concessions

Article 5 of the Concession Directive provides that 'concessions' means a contract for pecuniary interest concluded in writing by means of which a contracting authority entrusts the execution of works or the provision and the management of services to one or more economic operators the consideration for which consists either solely in the right *to exploit the works or the services* that are the subject of the contract or in that right together with payment. The award of a works or services concession *shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services* encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire *shall involve real exposure to the vagaries of the market*, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

§8(5)-(7) of Act CXLIII of 2015 on Public Procurement (hereinafter referred to as Public Procurement Act), which transposed the Concession Directive, reproduces verbatim Article 5 of the Concession Directive in Hungarian.

It is clear that a decisive element of the definition of a concession is the operating risk in exploiting the works or the services. The Concession Notice does not contain any information on the risk the Concessionaire would bear. The Head of Cabinet of the Prime Minister explicitly stated in the cited [press event](#) that the government does not intend to transfer the right to exploit Hungary's controlled-access highway network to the concessionaire, the toll would be collected by the State, and although the fee to be paid to the Concessionaire by the State would be financed from the toll, there would be no correlation whatsoever in the quantity of the collected toll and the paid availability fee. Given the limited information we have, it is hard to assess the size and type of risk the Concessionaire will be bearing, however it seems apparent that the risk will not relate to the exploitation of the works and services the Concessionaire will provide; and consequently, it will surely not encompass demand or supply risk. The only risk the Head of Cabinet mentioned at the press event was the currency risk that would be originating from the fact that the currency of the compensation will be Hungarian forint. We would also point out that in addition to the availability fee the Concessionaire will also have right to the 'additional investments tariffs', which is not defined in the Concession Notice what it would cover, but apparently an additional compensation to the Concessionaire.

Considering the above, we are of the opinion that the planned contractual arrangement misses key elements of the definition of concession, namely the transfer of the right to exploit the works and the services and the transfer to the concessionaire of an operating risk in exploiting the works and services, therefore it is in fact not a concession, but a covert public procurement, and consequently it constitutes an infringement of both the Concession Directive and the Public Procurement Directive.

The question of the duration of the concession

Article 18(2) of the Concession Directive provides that for concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives. The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

Recital (52) of the Concession Directive further explains that the duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the

market, and may thereby hinder the free movement of services and the freedom of establishment.

§133(2) of the Public Procurement Act stipulates that works or services concessions can be concluded exclusively for a definite period of time. If the duration of the works or services concession exceeds 5 years, the Contracting Authority shall support with calculation that the duration of the contract does not exceed the duration within which – based on reasonable assumptions – the Concessionaire recoup the investments made during the duration of the contract for the implementation of the works or services and in relation to the execution of the contract; and the invested capital can produce a reasonable return.

Having regard to the fact that the duration of the planned concession is extremely long, i.e. 35 years, Transparency International Hungary requested the calculation set out in §133(2) of the Public Procurement Act from the Contracting Authority, that is, from the National Concession Bureau, under the Freedom of Information Act. The National Concession Bureau refused to comply with our request, citing confidentiality of preparatory documents relating to a pending case, which is a false explanation in our opinion as the decision of the duration of the concession had been made prior to the submission of the public interest information request by Transparency International Hungary, therefore in this specific regard the case was not pending, and the information sought was not to be deemed preparatory. As a consequence, we do not have any information whether the duration of the planned concession, 35 years can be justified with a calculation in conformity with the Concession Directive and the Public Procurement Act. However, given the extremely long nature of the duration, we believe that there is a real danger of an unjustified restriction of competition and the hinderance of the free movement of services and the freedom of establishment.

The road construction sector is a significant market of the European Union. In 2018 the [volume of investment](#) in inland transport infrastructure in the EU amounted to ca. EUR 100 billion. Closing a national market for 35 years on such an important sector could seriously fragment the Single Market, therefore it is of utmost importance to conduct a careful examination on its financial and economic justification. We are certainly aware that there are few EU Member States using concessions for the operation and maintenance of highways, but to our knowledge the only country where the whole highway network was concessioned to a private company was Italy, however this company has been recently nationalised.

Considering the above, regarding the extreme length of the duration of the planned concession, which seriously endangers the European Single Market, and regarding that the calculation that could justify this duration is not public, we deem indispensable that the European Commission examine the planned concession whether it complies with EU principles and the Concession Directive.

Recognising that the issues we raised in our letter are complex in nature, we intend to proceed with the ultimate objective of working with decision makers towards solutions that are legal and ultimately serve the public good. We are looking forward to the outcome of your assessment and we hope that we could contribute to the protection of core EU values and principles.

Sincerely,



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