

Open Competition,  
Transparency, and Impartiality  
in Local Government  
Contracting Out  
of Public Services

Dr. Kenneth K. Baar



# Table of Contents

- 1. Introduction ..... 103
- 2. Laws Requiring Competitive Procedures ..... 106
  - 2.1 EU Directives ..... 106
  - 2.2 Recent EU Communications ..... 107
  - 2.3 Public Procurement Laws in CEE Countries ..... 107
- 3. Public Access to Public Contracts (Transparency) ..... 110
  - 3.1 Transparency in Western Countries ..... 114
  - 3.2 Transparency and Public Participation in the Drafting of Contracts ..... 118
- 4. Conflict of Interest Laws ..... 119
  - 4.1 Conflicts of Interest and the Law in CEE Nations ..... 119
  - 4.2 Conflict of Interest Laws in the EU and the US ..... 121
- 5. Conclusion ..... 124
- Appendix A ..... 126
- Appendix B ..... 130
- Notes ..... 135



# Open Competition, Transparency, and Impartiality in Local Government Contracting Out of Public Services

Dr. Kenneth K. Baar

## 1. INTRODUCTION

The contracting out and privatization of the provision of basic public services, including the operation of district heating, water and sewer services; refuse collection; and park and road maintenance is widespread in Central and Eastern Europe (CEE) and is steadily increasing in scale. Such privatization of service provision is taking place through short term contracts, long term concession contracts, and/or the sale of public service facilities.

In CEE, local governments are even more dependent on the contracting out and privatization processes than in Western Europe. Whilst governments in Western Europe can generally obtain capital at a lower interest rate than private companies in order to upgrade their systems, in Central and Eastern Europe the reverse is true—local governments are dependent on outside capital in order to undertake capital improvements. Furthermore, local governments in the CEE are under pressure to upgrade water and sewer services in order to meet EU accession standards. Also, they are under pressure to upgrade district heating systems in order to reduce the substantial financial burdens of their provision.

How the contracting out and privatization of services is conducted will determine the future costs of these basic services, which have a significant impact on household budgets, and it will determine the future ownership and control of substantial public assets.

The purpose of this chapter is to address basic issues related to the use of competitive bidding processes, transparency, and impartiality in contracting out public services in the CEE and to present a comparative discussion of practices in the EU and other nations. This chapter examines the contracting out practices in four CEE nations (the Czech Republic, Hungary, Romania, and Slovakia) and it provides a comparison discussion of practices in Western Europe and the U.S. It

is based on a combination of interviews and research and is subject to the caveats that while somewhat precise information could be obtained about legislation in the CEE, widely divergent views were presented about prevailing practices, and information on actual practices has not been collected on a systematic basis.

The issues that are covered include:

- a) The applicability of procurement laws and other provisions requiring competitive procedures for the selection of contractors;
- b) Public access to contracts and information considered in price setting proceedings. (freedom of information);
- c) Requirements of impartiality and the prevention conflicts of interest in the selection of contractors.

Each of the above may be seen as a basic prerequisite to the conduct of contracting out in a manner that best serves the interests of the public. If conflicts of interest are permitted, bidding is not really competitive. Without competitive bidding for contracts, there is no assurance that the public is obtaining the most favorable terms for the provision of its services. Without transparency, corruption is more likely and public trust in the fairness of selection process is eliminated. Furthermore, without transparency, the general public is excluded from the contracting out process. As a result, the potential benefits of independent public review, criticism, and expertise are lost.

In the past decade each of these issues has been the subject of intensive public interest and legislative reform in West Europe, as well as the countries in CEE.

While the purpose of contracting out is to increase efficiency, reduce costs and/or obtain investment resources that are not available to local governments, contracting out or privatization may result in either substantial public benefits or irreversible harm. It places governments in a role that may be even more complex than that of service provider, the role of contractor and regulator. The manner in which contracting out is undertaken is critical in obtaining beneficial results. This is especially true when long term contracting is undertaken, as is common when contracting is undertaken for the purpose of inducing private companies to upgrade public service systems. Although there is no prescription to insure that contracting out will work effectively, the process by which it is undertaken can play a critical role.

While the contracting out of public services has becoming increasingly widespread in Central and Eastern Europe, the degree of contracting out differs significantly among the nations of the region. Typically, national laws authorize the contracting out of services and govern long term concession contracts. In some nations the sale of utility infrastructure is prohibited.

In the Czech Republic, privatization has always had a high place on the public policy agenda. Commonly, the physical components of infrastructure as well as operating services have been

privatized. In larger cities, public ownership of water facilities has been maintained, but service provision has been contracted out on a long-term basis. In the mid-1990s, the French government funded education programs for local governments which advocated such an approach. In smaller cities, the privatization of water infrastructure as well as service has occurred. In the case of district heating, privatization of the infrastructure as well as the service provision is common in larger cities. In Prague, water service, refuse collection and park maintenance have been contracted out to private companies. Each of the city districts has authority over these services and contracts out for them individually. However, the districts have all elected to contract with the same company. The refuse and park collection contracts are for one year. As a matter of practice, they are renewed with the same company.

Under Hungarian law, local governments are not permitted to sell the physical portions of their infrastructure. It has become standard practice for cities to create one or more municipally owned companies which are responsible for park, road maintenance, snow clearing, refuse collection, and cemetery services. In turn, some of these services are subcontracted out to private firms. Typically, park maintenance services are divided into sections of the city and subcontracted out on a section by section basis, resulting in numerous subcontractors for this service. (The typical length of such contracts is 3 to 5 years). Refuse collection services are commonly contracted out to foreign firms when significant capital investments are required in order to create new disposal sites. In such cases, 25 year contracts are common. Interviewees estimated that about 10% of all water services are contracted out to private investors. Approximately seven of the 109 municipalities that have district heating systems have entered into long term concession contracts (typically 15 to 20 years) for the operation of their services. In addition, a few municipalities have entered into lease agreements in order to upgrade their systems. Under the agreements, specified improvements by a private company becomes the property of the district heating company after making monthly payments for a fixed term, typically about ten years.

In Romania, the contracting out of services is less common than in the neighboring countries. The sale of publicly owned assets is prohibited.<sup>1</sup> However, concession agreements are becoming widespread. Bucharest has entered into concession contracts for the provision of water and sewer and has executed five year contracts with three different companies for refuse collection. Other cities have contracted out refuse collection and/or park maintenance.

In Slovakia, about half of all cities have contracted out waste collection. Other commonly contracted out services, which are contracted out by cities and the individual districts in Bratislava, include park maintenance and street maintenance. Typically park maintenance contracts are broken down into sub areas of the contracting jurisdiction and are short term.<sup>2</sup> Unlike in the neighboring countries, the state is just beginning to transfer ownership of water and district heating facilities to local governments. Bratislava has sold its district heating company to a foreign company. Komarno officials indicated that plans are under consideration to sell its district heating facility.<sup>3</sup>

## 2. LAWS REQUIRING COMPETITIVE PROCEDURES

### 2.1 EU Directives

The EU is conditioning accession on conformance with its public procurement standards. As a result, EU regulations are viewed by the CEE nations as the standard for required practices. The EU extensively regulates the conduct of tendering in its member states pursuant to its free competition objectives and it places a high priority on conformance with its standards. Furthermore, conformance with EU procurement standards has been a precondition to EU accession. Public procurement processes have been considered as essential tools for bringing about fair competitive processes and transparency in public contracts. In the EU, as well as in Central and East Europe, policies and practices with regards to these issues are in an evolving state and detailed discussion.

Each of the CEE nations has adopted detailed procurement legislation, largely based on EU models. In the CEE countries, EU standards operate as a *maximum as well as a minimum* for the coverage and standards of procurement laws. While requirements of competitiveness and transparency are critical for effective contracting out, exceptions to the such requirements are widely exploited.

In the past decade, the EU has been taking steps to expand the applicability of its procurement standards to public service contracts. In 1992, the EU adopted a directive that is applicable to public services contracts. It includes a broad definition of 'contracting authorities' as follows:

- contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of the authorities or bodies governed by public law. Body governed by public law means any body:
- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality and
- *financed for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.*

*EC Directive 92/50/EEC, 18 June 1992*

However, the services directive contains some very significant exemptions. The Directive is applicable to contracts for "pecuniary interest".<sup>4</sup> This clause is interpreted to mean that it is not applicable to contracts under which the payment to the service provider comes from user fees rather than from the contracting authority (for example a contract between a public agency and a private company for refuse collection, supported by user fees). In line with this concept, concession contracts have been excluded.<sup>5</sup> This exclusion has been subject to wide criticism.

The services directive also excludes contracts for the acquisition or rental of land or other “immovable property”.<sup>6</sup> This section results in the exclusion of the rental or sale of utility infrastructure.

## 2.2 Recent EU Communications

Although concession contracts and other contracts without a “pecuniary interest” are exempt from the EU’s public service directive, a recent (April 2000) Commission Interpretative Communication on concessions under Community Law sets forth the conclusion that such contracts are subject to the Treaty requirements of adherence to the principles of open competition and transparency. The Interpretative Communication notes the EC rules instituting and guaranteeing the proper operation of the Single Market, including:

- the rules prohibiting any discrimination on grounds of nationality
- the rules on the free movement of goods, freedom of establishment, freedom to provide services,<sup>7</sup>

It further notes that:

The principle of equality of treatment implies in particular that all potential concessionaires know the rules in advance and that they apply to everybody in the same way. The case law of the Court [...] lays down that the principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all measures required to ensure the exercise of this activity.<sup>8</sup>

## 2.3 Public Procurement Laws in CEE Countries

Consistent with the EU directives, the CEE laws have contained significant exceptions in their coverage which result in substantial exemptions for contracted out services and/or the privatization of public services. The most notable are exemptions from procurement laws and other types of public scrutiny, including:

- government contracts for services which provide that services shall be paid for directly by citizens (rather than by the local government) and, therefore, are not for pecuniary interest;
- concession contracts;
  - the transfer of stock within mixed public private companies which effectively transfer control to private companies;
  - the sale or rental of physical infrastructure.

In the case of Hungary and Romania, exemptions for public service contracts from procurement requirements are counter to the broader purposes of their procurement legislation. The purposes

of the Hungarian law include “{...} establishing the transparency of the use of public funds and its wide-ranging public controllability, furthermore, providing for the purity of competition in the course of public procurement,{...}”<sup>9</sup> The Romanian procurement law sets forth similar objectives.<sup>10</sup>

The Czech Republic adopted a procurement law in 1994.<sup>11</sup> In 2000, the coverage of the law was extended to contracting out by private monopolies and city owned companies. The law exempts contracts for the purchase of water and energy, placed by producers, carriers, and distributors.<sup>12</sup> In addition, as in other nations, the law has been interpreted to exclude contracts for services when the services are paid for directly by the citizens, such as refuse collection, based on a provision which states that a “public contract” is understood to be a contract for “pecuniary consideration.” While city purchases are covered by the procurement law, other types of transactions, including city rentals or sales of public infrastructure are not subject to such requirements. For example, a city rental of a refuse disposal site is not controlled. Another route to privatization beyond competition and public tendering requirements has been the through the creation of a company which starts with a majority share of public ownership but then becomes mostly privately owned. Besides not being subject to the procurement law, such transfers can take place without the approval of the municipal council, because councils do not have legal control over the city representative of the company. Proposals for legislation to bring such transactions under public control have not been successful. The law contains a detailed list of the information that must be included in an assessment and evaluation report by the public procurement commission;<sup>13</sup> however, it only provides for access to such reports only by other bidders, who may “view” the report (as opposed to obtain a copy).<sup>14</sup> The manager of one local government indicated that it was common practice among local governments to select criteria for procurements so as to ensure that a particular company would win a contract.

In Hungary, as in other nations, a principle exemption is created by the limitation to services for which pecuniary consideration is paid for by the city are for solid waste services supported solely by user fees. If the service is partly paid for out user fees and partly subsidized, it is covered by the Procurement Act. Furthermore, while a contract with a private company to provide user fee funded services is exempted from the procurement law, purchase activities of that private company (e.g. the purchase of trucks by a waste disposal company pursuant to the performance of public service) are covered by the act. A separate act covers the contracting out of refuse collection and chimney services.<sup>15</sup> But it does not set forth standards for these tenders. In some interviews, directors of municipally owned companies indicated that the activities of their companies were not covered by the procurement legislation and that their subcontracting for public services was not subject to the procurement act. Other knowledgeable sources indicated that localities were claiming exemptions on the basis that under the Procurement Act “public service providing activity” only covers activities “*qualified by ... municipal by-law* as public service, activity provided by an institution in the public service, public utility or communal service.”<sup>16</sup>

In the course of interviews, this author found substantially differing opinions as to the scope of the Hungarian Procurement Act and statements that the law clearly did not allow for some of the interpretations which other experts claimed were common. Further clarification and possibly simplification, which obviates the need for substantial cross-referencing to other legislation, might bring about greater uniformity of interpretation.

The EC Commission, while commenting that “Hungarian legislation on public procurement is largely compatible with EC directives in this field”, noted that: “... the Hungarian legislation does not meet all the requirements of EC Directives regarding the utilities sectors (namely energy, telecommunications, water, and transport).<sup>17</sup> In 1998, interviewees from the Ministry of Justice and the Procurement Council indicated that plans were underway to take the steps that would be necessary to bring the Hungarian standards in conformance with the EU standards by the time of accession. However, there were differences in opinions among the interviewees as to the extent of diversion between the EU standards and Hungarian law.

Romania adopted a new procurement law in 1999.<sup>18</sup> However, since then, its implementation has been delayed pending the implementation of regulations. The law contains a basic statement of principles which includes: free competition; efficiency in the use of public funds; and transparency; and introducing a national regulatory agency, publicity rules for tenders, and statistical reporting requirements; which were all absent from the previous legislation.<sup>19</sup>

Its coverage of entities which perform government functions is broad, including the operation of fixed networks which provide service to the public in connection with the provision of drinking water, electricity, gas, or heating. However, it contains an exemption for contracts where consideration consists of the right to exploit. As in the other nations, privatization can be accomplished through the creation of joint ventures without meeting public procurement requirements.

Slovakia adopted a new Public Procurement Act in 1999.<sup>20</sup> Concession contracts for the administration and control of physical assets of public services are now exempt.<sup>21</sup>

Exemptions from public procurement requirements for concession contracts and other types of public service contracts make little sense from a public policy perspective. The concept that there should be an exemption or a less stringent procurement rule because the payment for a public service comes directly from the private users rather than with public funds or that the service goes directly from the private company to the user exalts form over substance. Funds for all services come from taxes or fees paid by private individuals. Furthermore, in the case of a public service performed by a private contractor, the contractor has received a monopoly position, which has economic value, from the public sector. In light of the fact that the monopoly position has economic value, it is certainly a form of consideration. At the same time, the interests of the public in securing the benefits of the Procurement Act are the same whether the service and/or the payment for the public service is directly from the citizen to the service provider or via a government agency.

### 3. PUBLIC ACCESS TO PUBLIC CONTRACTS (TRANSPARENCY)

In several of the nations in the CEE region, it is common or standard practice for government agencies to take the position that contracts for public services are secret. Such secrecy has frequently become a major political issue, as result of discontent over public contracts.

Freedom of information is a relatively new right among the basic freedoms. Almost all of the nations in Europe have adopted a freedom of information law. However, nearly, all of these laws contain an exception for commercial information if it is of a “confidential” nature and/or if the release of the information will harm the competitive position of the company or discourage commercial contracting with the government. But, freedom of information laws do not contain definitions of what information falls within these parameters.

The difference between the national policies rests on how this undefined exception is interpreted. In some nations the mere claim or belief that information is of a confidential commercial character is sufficient to provide a basis for denying access to contracts for public services. In other nations only a very limited amount of commercial information is considered to be of a confidential nature, denials of access must be justified on very specific grounds, and public service contracts are public record.

Where a broad cloak of secrecy is still in effect, it is a vestige of a long historical concept that places government in the role of master rather than servant of the public. Significant reforms have taken place within the past few decades and the EU has started to adopt standards which apply to EU government and proceedings. However, it has not adopted freedom of information rules that are applicable to member states, with the exception of rules applicable to access to environmental information.

Most Central and Eastern European nations have adopted constitutional provisions which provide for a right to information and access to public records. Commonly these provisions contain exceptions or qualifications that may be used to severely limit their scope. Examples include exceptions for “the rights of others” or “economic interests of the state”. Others require that the party interested in obtaining the information must have a particular interest, such as a “sufficient legal interest” or the information must “concern” them. Some of the constitutions require implementing legislation defining the scope of exemptions or setting forth the procedures for availability of information. Typically, such legislation has not been adopted. (Appendix A contains the freedom of information sections in the constitutions of CEE nations.

Under the Czech Constitution (Article 17), the following is stated:

- (1) {...} the right to information is guaranteed;
- (4) {...} and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality;

- (5) Organs of the State and of local self-government shall provide in an appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law.

A 1998 commentary on the Czech law noted that statutory limits to access to information included state secrecy, economic or professional secrets and that the rules for “secret information” and “commercial secrecy” were vague.<sup>22</sup> In 1999, the Czech Republic passed a new freedom of information law. During the debates over the new law, opponents argued that city officials would be flooded with requests for copies of the contracts; but since its passage the flood has not emerged. The public officials interviewed indicated that contracts executed after the adoption of this law are made accessible to the public, but that earlier contracts are not covered. “Trade secrets” are an exception to the right to freedom of information. In order for information to qualify as a trade secret all of the following conditions must be met: it has to deal with:

- a) facts of trade, industrial or technical nature related to the company;
- b) it must have potential value;
- c) it cannot be commonly available in business circles;
- d) the entrepreneur desires that it be kept confidential.

Information submitted in price setting proceedings is not considered to be public record. For example, in accordance with national law, an office of energy regulation has to review the power over district heat prices set by local companies. In cases where prices exceed specified levels, rate increases must be justified under a cost and asset value formula. The proceedings for making these determinations are not public and the cost information submitted is not public record.

Under the Hungarian Constitution (Article 61) “... everyone has the right to ... information of public interest...” Furthermore, under the Hungarian Law “On the Protection of Personal Data and Accessibility of Data of Public Interest”,<sup>23</sup> the authorities are required to grant access for anyone to the data of “public interest”, unless the data is specifically restricted by law.<sup>24</sup> There is no specific exemption in that law for commercial information. Furthermore, “data of public interest” is broadly defined to include: “any information under processing by an authority performing state or local self-government functions or other public duties, except for personal data.”<sup>25</sup> Another section of the law states that: “Access to data of public interest may not be restricted to protect those data of a person acting on behalf of the authority which are conjunctive to his or her duty.”<sup>26</sup>

Hungary also has a separate business secrets law, which protects “any fact, information, solution or data, connected to economic activities, the secrecy of which is in the reasonable interest of the entitled party.”<sup>27</sup> Its laws do not set forth the relation between the Accessibility of Data and the Business Secret laws. In the course of interviews in the spring of 1998 in over ten cities, in the majority of the cases, subject to the exception of a substantial minority, local officials took the

position that contracts by public entities with private companies were not public records and therefore, citizens do not have the right to obtain such documents. In some cases, inquiries as to whether such records were public made local officials rather uncomfortable. In some cases, mixed responses were given; the local official responded that in principle the contracts were public, but that in practice nobody had requested copies of contracts and they were not given out. In other cases, such requests were viewed as unreasonable. As in the case of public contracts, submissions used for public price settings are not treated as public records. The most significant example of this practice is that submissions to the Ministry of Transport, Communication, and Water Management, are used for setting the water price for the five regional companies, which set rates for 45% of the country, are not accessible under current practice. Furthermore, the submissions that are used to justify local tariff subsidies for hundreds of water districts are not accessible.

In opinions regarding the relationship between public funds and private business, the national ombudsman has stated that “The transparency and controllability of the privatization processes, as public interest, takes precedence over the private interest of protection of business secrets.”<sup>28</sup> In November 1998, in a case involving a challenge to the Transport Ministry’s decision to keep a highway concession agreement secret, the ombudsman commented that:

Citizens and their organizations can only keep a check on the activity of the state if they have sufficient information on their operation. {...} State or municipal organs learn business secrets very often when they deal with asset management and when they manage public funds. In these cases the principle of publicity has priority, since the utilization of public finances should be transparent. Since free access to information is a constitutional right, the right to have business secrets can not come before that. Private companies that apply for state or municipal subsidies or enter for a competition for subsidies or companies that have business relations with the state and municipality where public finances are involved, or if they manage public assets, often are exposed to the restriction of the right to have business secrets.<sup>29</sup>

Subsequent to the ombudsman’s decision, the Ministry of Transportation has still refused to release the contract. (Appendix B contains the complete text of the Ombudsman’s decision.)

The Romanian Constitution sets forth the right to public information in broad terms. It states that: (*Article 31*)

- (1) A person’s right of access to any information of public interest cannot be restricted.
- (2) The public authorities, according to their competence, shall be bound to provide forcorrect information for citizens in public affairs and matters of personal interest.

Under the national law governing local authorities which has expired, one of the duties of local secretaries was to make sure that “decisions and orders of general interest are made public,” including “abstracts or duplicates of any act in the council’s archives”.<sup>30</sup> But these provisions contained an exception for documents with “a secret character under the law”. Up to this time, “secret character

under the law” has not been defined by any law. According to author-investigated information, as a matter of practice, public contracts and related information are kept secret. In the draft of the new law on local public services every person has the right to “access to information about the local public services” and the “right to be consulted, directly or by means of non-governmental organizations of the users, while the decisions, strategies, and the regulations on the activities related to local public services are drawn and adopted.” In 1996, freedom of information legislation was introduced in the parliament, but was not adopted.<sup>31</sup> Since then, access to information in public contracts has become a major public issue in reaction to the execution of a secret contract between the national telephone provider (Rom Telecom) and a Greek firm. As of August 2001 a new freedom of information law had been passed by the parliament but had not been signed into law.

In March 2001, a shadow was cast over freedom of information in Romania by the introduction of a broad law for the protection of “classified information”. Classified information includes:

economic information which {...} affects national economic interests. Public officials and citizens who fail to turn over or fail to report their knowledge of such information to the national authorities.

The government indicated that the passage of such a law was necessary in order to join NATO. Subsequently, the Romanian Supreme Court struck down the law on the basis of procedural defects in adoption. The draft freedom of information law sets forth a basic right to access to information which contains the typical exemptions from public access. In addition to these laws, the procurement law contains specific provisions regarding public access which requires that the authorities maintain the confidentiality of commercial secrets.<sup>32</sup> More importantly, all access to the information in contracts is effectively cut off by a provision in the implementing regulations which contains a model contract which states that a contract may not be released to the public without the consent of both contracting parties.

Under the Slovakian constitution:

State bodies and their territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner. The conditions and manner of execution will be specified by law.<sup>33</sup>

In 1998, the secrecy of a Bratislava contract with a foreign company (Siemens) for the provision of street lighting became a major public issue. Also, in recent years, public reactions to the policies of the Meclar regime led to strong pressures for more open government after its fall from power. On 1 January 2001, a new free access to information act became effective. That act covers:

- c) information obtained through public funds or relating to the use of public funds or state or municipal property,
- d) {...}information under Sec. 3, Sec. 2. [... information pertaining to the management of public funds and utilization of state property or the property of municipalities;

and [information] on the content, performance [of any concluded agreements] and activities carried out on the basis of any concluded agreement.]

The Act contains the standard exemption for any information “classified as a trade secret”.<sup>34</sup> (Commercial Code Sections 17–20). However, “Disclosure of the following information shall not be deemed as a violation or jeopardizing a trade secret: ... information obtained through public funds or relating to the use of public funds or state or municipal property.”<sup>35</sup> In the course of interviews, some public officials took the position that contracts for public services are available to the public as a result of the new freedom of information law and provided copies of the contracts, while others maintained that they were confidential. One city official took the position that contracts between the city and private companies were public record but that a contract governing the relationship between a municipal partner and a private partner in a joint venture was a commercial secret.

The Romanian Concession law,<sup>36</sup> which is modeled after the French concession act, contains extensive requirements on the terms and conditions of a concession contract. In addition, the law requires that the initiation of a concession has to be accompanied by an opportunity study which contains a statement of:

- 1) the reasons of an economic, financial, social, and environmental nature which justify the concession,
- 2) the necessary investments for modernization and extension,
- 3) the estimated period of the concession,
- 4) the minimum rent.<sup>37</sup>

The contract is subject to the norms set up in a frame document to be approved by the government.

### 3.1 Transparency in Western Countries

Some nations, including Canada, Australia, Sweden, and the U.S. have developed strong transparency requirements, which include public access to public contracts. In these nations transparency is a fundamental right in the law and in practice. Exemptions are narrowly interpreted and some of the access laws provide that public interest in access may override the commercial exemption. Public contracts and information submitted to price setting agencies are both readily and easily available to the public.

Western European Declarations and Legislation on access to public documents contain broad statements of a principle of public access, which are subject to broad exceptions. In the past decade, EU nations have been moving towards stronger freedom of information requirements. Access to public documents has been an area of increasing concern in recent decades.<sup>38</sup> In 1982,

the Council of Europe Committee of Ministers adopted a “Declaration on the Freedom of Expression and Information”.<sup>39</sup> It states that they “...seek to achieve the ... following objectives: ... the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual’s understanding of, and his ability to discuss freely political, social, economic and cultural matters; ...”<sup>40</sup>

The EC Code of Conduct Concerning Public Access to Council and Commission Documents, which was adopted in 1993, sets forth the General Principle that “The public will have the widest possible access to documents held by the Commission and the Council”.<sup>41</sup> The Code requires that decisions of its institutions on requests for documents must be made within 30 days, that the grounds for a refusal must be set forth in writing, and that means of redress are available through judicial proceedings and complaints to the ombudsman.

#### *Exceptions to Access under EC Code of Conduct*

The institutions will refuse access to any document whose disclosure could undermine {...}

- the protection of the public interest (public security, ... monetary stability), ...
- the protection of commercial and industrial secrecy,
- the protection of the Community’s financial interests,
- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information. {...}”

However, EU standards for freedom of information of member states are limited to environmental information.<sup>42</sup> The applicable directive contains the standard exemption for “commercial and industrial confidentiality.” Pursuant to this directive, the member nations have adopted legislation specifically for access to environmental information.

Under Austrian law, public agency contracts are not public record. However, a losing bidder in a tender has the right to see the contract that is made with the winner of the tender.<sup>43</sup>

Under French law governing access to administrative documents,<sup>44</sup> there is an exception for commercial and industrial secrets.<sup>45</sup> A ‘Commission d’Acces aux Documents Administratifs’ (the Commission for Access of Administrative Documents) (CADA) is responsible for administering the law and making administrative determinations about access to particular documents. Its commentary on the French act notes the scope of the exception is not precise and that it has not been defined by the courts.<sup>46</sup> However, the 1999 annual report of the Commission states that all the financial elements, including the detailed prices, contained in a contract with a public agency, are public record because they reflect elements of the cost of the service to the public.<sup>47</sup> (In contrast, in the case of offers that are not accepted, only the global price offered is public record.) The report lists cases in which it has ruled that concession contracts are public record.<sup>48</sup>

Germany has not adopted freedom of information legislation, except within its environmental legislation.<sup>49</sup>

In Great Britain, the public access issue has been the subject of wide discussion and pressures for reform. In 2000, Great Britain passed a new freedom of information act.<sup>50</sup> The act contains an exemption for “trade secrets” and for cases in which disclosure would “prejudice the commercial interests of any person (including the public authority holding it).”<sup>51</sup>

Pursuant to the new act, the government is drafting a “Code of Practice on the Discharge of the Functions of Public Authorities...” In the draft version, public authorities are directed to severely limit the use of confidentiality clauses and only accept such provisions when their use is for “good reasons and can be justified by the Commissioner”.

*Code of Practice on the Discharge of the Functions of Public Authorities  
under Part I of the Freedom of Information Act of 2000*

24. When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted in the Act. In particular, when entering into contracts, as when receiving information from third parties more generally, public authorities should not agree to hold information ‘in confidence’ which is not in fact confidential in nature.

25. Public authorities when entering into contracts with non-public authority contractors may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should, whenever commercially viable, endeavor to obtain the agreement of the non-public authority contractor that no such confidentiality can be set up against a request for the disclosure of such information.

26. Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified by the Commissioner.

27. Public authorities should not impose terms of secrecy on contractors unless the information concerned would be exempt within the terms of the Act. However, except where paragraph 28 below applies, it is for the public authority to disclose information pursuant to the Act, and not the contractor. The public authority may need to protect from disclosure by the contractor information which would be exempt from disclosure under the Act, by appropriate contractual terms.

Under the former British Freedom of Information law, there was a non-statutory *Code of Practice on Access to Government Information*, which included an exemption for “commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party”. The “Guidance on Interpretation” issued by the Cabinet Office advised decision makers to ask three questions when deciding whether to withhold commercial information:

- (i) is the information {...} a trade secret, a commercial confidence, or intellectual property? The Code suggests adopting the Alberta *Trade Secret Act 1986* definition of a trade secret. If the answer is “no” then the exemption does not apply. If the answer is “yes” {...}
- (ii) would its disclosure be likely to harm the competitive position of the subject or source of the information? If the answer is “yes”, disclosure is unwarranted unless there is an overriding public interest in disclosure. If the answer is “no” {...}
- (iii) would its disclosure be likely to prejudice the future supply of information to the government? If the answer is “yes” then disclosure is unwarranted.<sup>52</sup>

Some agencies, including the national agency which regulates water prices (OFWAT), provides public access to cost submissions which are used to justify price increases.

Under Swedish law, “access to official documents may be restricted only if the restriction is necessary having regard to ... 5. the public economic interest; 6. the protection of {...} economic conditions of private subjects.”<sup>53</sup> The term ‘document’ is broadly defined to include any document in the possession of a public authority.<sup>54</sup> All documents are public unless exempted by the Secrecy Act. In regards to commercial information that act exempts: A person’s business or management conditions, inventions or research results, if it can be assumed that the person concerned would suffer loss should the information be disclosed. However, the act also permits the government to override the secrecy provision “if the government deems it important that the information is provided.” As a matter of practice, contracts for services are made public.

Under the Canadian freedom of information act, public contracts are treated as public records. The exemption section of its legislation states that:

Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains trade secrets of a third party; financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>55</sup>

As in Sweden, there is a provision which allows the public interest to override a commercial exemption. Judicial analysis of the exemption section illustrates the narrow interpretation of the

scope of the exemption. One decision notes application of the financial information exemption “require[s] a reasonable expectation of probable harm {...} speculation of mere possibility or harm does not meet that standard”.<sup>56</sup>

Under U.S. laws, contracts by public entities are public record. The federal Freedom of Information Act contains an exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential...”<sup>57</sup> State laws, which govern contracts by state and local governments, contain similar provisions. Typically the commercial exemptions are interpreted narrowly.

In a leading decision “trade secret” was defined as:

a secret, commercially valuable plan, formula, process or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.<sup>58</sup>

Generally, commercial information that is used to demonstrate that a company has the financial resources to undertake a project or to protect trade secrets is exempted from public access. The common judicial test of whether a government agency can refuse to disclose business information is whether the release of the information would be damaging to the business or would discourage future competition for public contracts. For discussion of the commercial exemptions under the laws of Australia, Canada, France, Great Britain, Ireland, New Zealand, Sweden, and the United States see Baxter, Richard, “Commercial Confidentiality”, *Freedom of Information—Resolving Disputes* (1995)<sup>59</sup>

## 3.2 Transparency and Public Participation in the Drafting of Contracts

Research in Hungary revealed that contracts with local governments are commonly drafted by companies that win a tender without serious review by the local government and without the assistance of an attorney reviewing the contract and negotiating on behalf of the local government.

Possible measures to improve the quality of contracts include:

1. Creation of local government subcommittees with responsibility for drafting contracts,
2. Public hearings on the content of proposed contracts,
3. Inclusion of experts in the contract drafting process,
4. Requirements that the contract be developed before the tendering process.

A Romanian lawyer who specializes in municipal contracts stated that contracting out was typically characterized by a lack of performance standards and monitoring. A proposal for the creation of

water board modeled after the British Water Board (OFWAT) includes the provision of free technical assistance to cities in the preparation of concession contracts.

Opponents of public access to contracts and price setting information claim that public access discourages firms from entering into contracts with public agencies. Among their concerns is that business will be afraid to submit business information because it will be used by municipal councilors who are competitors or who are likely to share information with competitors. However, there does not seem any evidence to support this conclusion and the experiences of nations with public access to public contracts have not been marked by any lack of commercial interest in obtaining public contracts due to such rules.

On the other hand, there is no question that maintaining the secrecy of public contracts contributes to corruption, lowers performance requirements for drafting such contracts by shielding them from public view, and undercuts the credibility of the contracting out process.

## 4. CONFLICT OF INTEREST LAWS

*Just as it is impossible not to taste honey or poison that one may find at the tip of one's tongue, so it is impossible for one dealing with government funds not to taste, at least a little bit, of the King's wealth.*

Kautilya, Prime Minister  
of a state in Northern India

### 4.1 Conflicts of Interest and the Law in CEE Nations

Throughout the CEE, interviewees stated that conflicts of interest are standard in the public contracting process. Typically, members of City Assemblies vote on contracts in cases when they also have an interest in the enterprises that are awarded the contracts. Conversely, interviewees recounted instances in which city assembly members opposed contracting out because they were on the board of the publicly controlled company which currently provided the service.

Conflict of interest laws are spread among laws governing national and local governments and commercial companies. In addition, national procurement laws prevent the participation of persons in the selection process of the procurement procedure with an interest in the outcome of the procedure. Sometimes the scope of the national laws is limited to a few specifically mentioned types of conflicts.

*While broad principles about the impropriety of conflict of interests are present in national laws, conflict of interest legislation is characterized by a lack of any penalties and/or enforcement mechanisms for violations.* None of the interviewees mentioned any instances in which public officials of any type had been penalized for conflict of interest violations or of cases in which contracts had been annulled due to such conflicts of interest. At the same time, there is general public disgust with such conflicts of interest.

The ineffectiveness of the national laws may be evidenced by the fact within each country widely differing answers were given about whether there even were conflict of interest laws and/or their scope. Commonly, interviewees who were knowledgeable about public law and policy stated that there were no conflict of interest laws. It seems that the laws which do exist act as theoretical statements of public objectives without much real significance.

Furthermore, some interviewees stated that persons who claimed that particular public officials had conflicts of interests faced the threat of lawsuits for defamation. After making such a claim, a deputy mayor of a major Polish City was subject to a defamation claim, which took five years to resolve. In the end, the former deputy mayor prevailed in national supreme court. at a cost that most people could not bear.

Conflict of interest laws can provide some relief by prohibiting direct and open ties between the decision making authorities and parties that are awarded contracts. Obviously, they cannot prevent secret ties. However, interviewees repeatedly indicated that such legislation would be very useful, even though it may be circumvented.

While this section provides describes the conflict of interest laws in the CEE, the EU, and the US, the real differences are in the political climate which determines whether or not the laws are enforced.

The Romanian procurement law addresses conflicts of interest in the procurement process by prohibiting the following interested parties from participating in a Procurement Evaluation Commission decision<sup>60</sup>:

- a) a spouse or relative to the third degree of one of the tenderers,
- b) persons who in the last three years have worked for or signed a contract with one of the tendering parties or what have participated in its Council of Administration or a leading administration body.
- c) persons who hold shares in a significant percentage of the capital of one of the tenderers.

Furthermore, parties that participated in the draft of the tender announcement and/or selection of tender criteria may not participate in the tender procedure and the party that is awarded the contract may not employ anyone who has served on the Evaluation Commission. Similar provisions are contained in Hungary's procurement law.<sup>61</sup> One district of Bratislava indicated that it requires

that members of procurement selection committees must sign statements indicating that they do not have any conflict of interest.

Interviewees in Romania indicated that there were no conflict of interest laws other than the provisions in the procurement law. In addition, persons who claim that a public official has a conflict of interest but fail to prove that claim may be subject to significant sanctions.

Czech interviewees stated that there were no real conflict of interest laws. However, the Czech administrative procedure law contains general and broad conflict of interest exclusions, which provide for the disqualification of an administrative authority's employees or members. It applies to situations in which "unprejudiced" consideration may be "doubted owing to his relationship to the matter, parties to the proceedings or their representatives".<sup>62</sup> Furthermore, any party to the proceedings is required to report any basis for disqualifying themselves or other employees which they are aware of.

The Public Service Law describes conflict of interest in very broad terms. It states that:

in the performance of his or her office, a public servant must proceed in a responsible manner, must respect and protect human dignity and human rights and freedoms: must avoid anything which would generate doubts regarding his or her objectivity in protecting the public interest.<sup>63</sup>

The views of knowledgeable persons that there are no conflict of interest laws in the Czech Republic, notwithstanding the above quoted sections, demonstrates the dormant state of the laws in this area.

Various Hungarian laws include provisions against conflicts of interest. For example, the Local Government Act excludes participation in decision making in a case where a person (or their relative) is personally affected by a matter.<sup>64</sup> A Civil Service law prohibits civil servants from pursuing activities which would endanger objectivity and impartiality in public service.<sup>65</sup>

Interviewees in Slovakia had different views about the state of the law, ranging from views that there was no conflict of interest law, that the law only applied to state employees, to the view that the law applied to municipal employees.

## 4.2 Conflict of Interest Laws in the EU and the US

In recent years in the EU, conflict of interest laws have been the subject of widespread national legislative activity and EC discussions as a part of the anti-corruption campaigns of the region.<sup>66</sup> In France and Great Britain, national agencies have been created for the purpose of enforcing compliance by local government officials with conflict of interest laws. Also, the laws commonly require local officials to disclose their assets.

The EC “Model code of conduct for public officials”, promulgated by the Committee of Ministers to Member States on Codes of Conduct for Public Officials, includes the following conflict of interest standards:<sup>67</sup>

*Article 13—Conflict of Interest*

1. Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, the impartial and objective performance of his or her official duties.
2. The public official’s private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organizations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.
3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to:
  1. To be alert to any actual or potential conflict of interest; take steps to avoid such conflict;
  2. To disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it;
  3. To comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.
4. Whenever required to do so, the public official should declare whether or not he or she has a conflict of interest.
5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur in the nature of those interests.

*Article 15—Incompatible outside interests*

1. The public official should not engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his or her duties as a public official. Where it is not clear whether any activity is compatible, he or she should seek advice from his or her superior.
2. Subject to the provisions of the law, the public official should be required to notify and seek the approval of his or her public service employer to carry out certain

activities, whether paid or unpaid, or to accept certain positions or functions outside his or her public service employment.

Great Britain adopted extensive conflict of interest legislation in 2000.<sup>68</sup> The Act provides for a national standards of conduct board, with investigative powers and adjudicatory powers, including the power to suspend officials from their public positions. In addition, the law and requires that each locality adopt a code of conduct and a local standards committee.

French law provides for an inter-ministerial inquiry committee which is charged with assuring the regularity and impartiality of public contracting procedures<sup>69</sup> and contains strong sanctions against violations of conflict of interest standards. Penalties of up to \$100,000 and \$200,000 are included.

The Danish conflict of interest law is very broad. It requires exclusion from participation in all public matters where there is a potential financial or personal interest. Furthermore, it requires exclusion in the event of “circumstances {...} are likely to lead to any doubt about such persons impartiality.”<sup>70</sup> Any person who has notice of the types of circumstances covered by the conflict of interest provisions is required to notify a superior as soon as possible. The Act does contain exceptions in the case that “no risk may be assumed to exist that the decision to be made may be affected by extraneous considerations.” or “it would be impossible or attended with substantial difficulties or misgivings to arrange for another person to act in his stead in considering the matter.”

In the US, conflicts of interest in local governments are covered by state laws.<sup>71</sup> Typically, these laws contain broad definitions of conflict of interest; they require public office holders to submit disclosures of their assets; specify a time period during which former public employees cannot represent private companies before the former employing agency; provide for substantial penalties; and establish independent commissions which are responsible for the enforcement of the laws. In the US, unlike Europe, financial disclosures which public officials are required to submit are accessible to the general public. U.S. law review articles contain detailed discussions of the practical strengths and weakness of the laws and their specific provisions.<sup>72</sup>

The US, laws expressly prohibit public officials from using their office or employment to obtain any financial gain for themselves, members of their family, or businesses with which their associated. Public officials are prohibited from accepting or soliciting anything of value if their vote would be influenced.

Other types of provisions include:

- prohibitions of substantial severance payments by private companies to employees prior to their assuming public positions;
- provisions which enable private parties, as well as the enforcement agency, to bring civil court actions;

- protections of ‘whistleblowers’ (public employees who report violations of the laws by their superiors).

The State Ethics Commissions typically have responsibility for:

- 1) conducting investigations and making determinations of these investigations;
- 2) insuring the filing and public availability of statements of financial interest;
- 3) issuing advise and opinions to persons about their obligations under the law.

## 5. CONCLUSION

In the CEE nations which were surveyed in this study, public policy and regulation in regards to contracting out public services is marked by severe shortcomings. A substantial portion of contracting out is exempt from competitive procurement requirements, contracts are widely treated as secret, and conflicts of interest are largely unregulated. Under these circumstances, the public has little reason to have faith or respect for the contracting out process and the essential elements of public participation and scrutiny are lost.

Reform in this area should include the following:

1. All contracts for public services (except for very small contracts) should be subject to a competitive bidding process.
2. Sales and leases of public facilities and sales of ownership shares in public facilities should be subject to the same competitive requirements as contracting out of public services.
3. All public contracts with private companies for the provision of public services should be accessible to the public (with very narrow exceptions for specified portions of contracts based on exceptional circumstances).
4. The drafting of public contracts should be an open process subject to public input and review.
5. Information submitted in price setting procedures should be public record.
6. Conflict of Interest Laws should include:
  - a. Broad definitions of conflicts of interest;
  - b. Requirements for disclosure of assets by public officials that are open to the public;
  - c. Prohibitions against representation of private companies by former public officials for specified time periods;
  - d. Protections of ‘whistleblowers’;

- e. Penalties for violations of the law;
- f. Independent national commissions responsible for enforcing conflict of interest laws.

Badly needed public investments in public service provision may not be undertaken or may be contracted out because otherwise they would be unaffordable. However, the types of reforms proposed here do not require public expenditures, and they provide possibilities for greatly improving the investments in public services which are undertaken.

## APPENDIX A

### Text of Constitutional Provisions and Legislation Covering Freedom of Information, and Exceptions to Freedom of Information Requirements (Including Commercial Secrets Legislation) in Central and East European Nations

#### Albania

*Albanian Constitution, Article 23*

1. The right to information is guaranteed.
2. Everyone has the right, in compliance with the law, to get information about the activity of state organs, as well as of persons who exercise state functions.

#### Bulgaria

*Bulgarian Constitution, Article 41 (Sec. 2)*

Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

#### Czech Republic

*Czech Constitution, Article 17*

- (1) ... and the right to information are guaranteed, ...
- (4) ... and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality,
- (5) Organs of the State and of local self-government shall provide in an appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law.

## Estonia

### *Estonian Constitution, Article 44 (Sec.2)*

At the request of Estonian citizens, and to the extent and in accordance with procedures determined by law, all state and local government authorities and their officials shall be obligated to provide information on their work, with the exception of information which is forbidden by law to be divulged, and information which is intended for internal use only.

## Latvia

### *Latvian Constitution, Article 100*

Everyone has the right to freedom of expression which includes the right to freely receive, keep and distribute information ....

## Lithuania

### *Lithuanian Constitution Article 25 (Sec.5)*

Citizens shall have the right to obtain any available information which concerns them from State agencies in the manner established by law.

## Macedonia (FYRM)

### *Macedonian Constitution, Article 16 (Sec.3)*

Free access to information and the freedom of reception and transmission of information are guaranteed

## Poland

Under the Polish Constitution the right to obtain access to public documents is subject to the "Limitations ... *imposed by statute* .... to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State." However, efforts to include a right for business secrets in the Constitution were rejected.

The Constitution states:

Polish Constitution (Article 61)

- (1) A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.
- (2) The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.
- (3) Limitations upon the rights referred to in Paragraphs (1) and (2), may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.
- (4) The procedure for the provision of information, referred to in Paragraphs (1) and (2) above shall be specified by statute, and regarding the House of Representatives (Sejm) and the Senate by their rules of procedure.

Although this article directs the legislature to adopt a statute governing procedures for access to information, no statute has been adopted up to this time. Also, no limitations in access have been adopted by statute. Nevertheless, according to the various sources contacted, contracts are regarded as secret.

## Romania<sup>73</sup>

*Romanian Constitution (Article 31)*

- (1) A person's right of access to any information of public interest cannot be restricted.
- (2) The public authorities, according to their competence, shall be bound to provide for correct information for citizens in public affairs and matters of personal interest.

## Russia

*Russian Constitution, Article 29 (Sec. 4)*

Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law.

## Slovakia

### *Slovakian Constitution Article 26 (Sec. 5)*

State bodies and their territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner .... The conditions and manner of execution will be specified by law.

## Slovenia

### *Slovenian Constitution (Article 39, Sec.2)*

Except in such circumstances as are laid down by statute, each person shall have the right to obtain information of a public nature, provided he can show sufficient legal interest as determined by statute.

## Ukraine

### *Ukrainian Constitution (Article 34)*

... Every person has the right to collect, keep, use and disseminate information ...

The execution of these rights may be limited by law in the interests of national security, territorial integrity or the public order for the purposes of preventing disturbances or crimes, to protect the health of the population, to protect the reputations or rights of other people, to prevent the announcement of information received confidentially, or to support the authority and impartiality of justice.

## APPENDIX B

### Decision by Hungarian Ombudsman —Public Access to Highway Concession Contract (1998)

Data Protection Commissioner

recommendation

relating the publicity of concession contracts

#### I. Launching an Inquiry

The president of the Legal and Advocacy Protection Committee of the Hungarian Automobile Club presented a petition to the Data Protection Commissioner asking for a position to be taken in connection with the content of the concession contract concluded between the Ministry of Transportation, Telecommunications and Water Management and the First Hungarian Concession Motorway Rt. (ELMKA) for the construction and operation of M1/M5 motorways. The petitioner holds the opinion that the business interest of the economic company and that of the Ministry concluding the contract can not be more important than the principle of having access to data of public interest. A similar opinion is aired by the president of ELMKA published in an article published in the monthly ‘Autósélet’ and attached by the petitioner. In this article, the president says: Issues in connection with the public service should be transparent, so the contract is practically open to everyone.

In connection with this issue I asked the Minister of Transportation, Telecommunications and Water Management to take position. The public administration State Secretary trusted by the Minister declared that the concession contract is a legal entity, not a fact, therefore it can not be considered as data, so the 1992. LXIII. act on the protection of personal data and publicity of public data is not applicable. According to his view, the concession contracts should be handled as any other contracts: the content of any contract can be known to a third party only if this is not excluded in the contract for business reasons.

Since the winners and creditors of the concession tender for motorways M1/M5 insist that the content of the contract should be handled as a business secret, the State Secretary is of the opinion that the Ministry applied the right step when denied publicity.

## II. The Legal Background of the Case

1. Section 10, paragraph (2) of the Constitution states that the exclusive property of the state and the circle of exclusive economic activities of the state is defined by law.
2. The preamble of Act XVI of 1991 on Concessions (hereinafter: ConAct) sets forth the following: ‘one possible way of way of efficiently operating the property exclusively owned by the state, or the local government or the associations of local governments, and of the exercise of the activities referred to the exclusive competence of the state or the local government is the assignment of all these by way of a contract of concession’.

The aim of contracts of concession is to assure the right to pursue activities. In the Act, there is a list of activities that the state is obliged to announce and then operate through concession. The concession contract can apply not only to the managing of already existing assets, but also for assets that will be the result of a future investment. One way of renouncing the right to operate is that the contracting party partially or solely undertakes the financing of big value investments where the capital requirement is very big.

The ConAct contains the following about the publicity of the concession procedure:

“ Section 4, subsection (1) The state or the local government shall invite tenders, with the exception of the aforesaid under Section 12, subsection (2), for the conclusion of a *contract of concession*. *Tenders - except when national defense or security reasons necessitate a closed tender, are open to the public. In this case Law-Decree No. 19 of 1987 on Tenders need not be applied.*

*Section 8, subsection (1) Invitation for open tenders shall be published in at least two dailies of nation-wide circulation, and, in the case of local government, in the local daily paper at least 30 days prior to the first day of the period of submitting applications. In the case of a closed tender, the invitees shall be invited to tender concurrently and directly.*

*(2) The invitation for tenders shall contain the aspects of evaluation and as to the activity subject to concession, it shall*

- a) list any other related activities*
- b) define the period of concession to be granted*
- c) define the geographical-administrative unit in which the activity is to be pursued*
- d) define the legal and financial conditions upon which the activity is to be pursued*
- e) define the conditions upon premature termination of the contract of concession,*
- f) contain information as to the rights of the state (local government) concerning the supervising of the terms of concession,*

g) *contain information as to who has the right to pursue activity subject to concession in the area affected by tender, at the time of inviting for tenders, and whether the invitor tends to grant the right of pursuing the activity subject to concession to other economic organisations during the term of concession.*

3) *If necessary, the tender shall also contain:*

a) *professional conditions pertaining to the pursuit of the activity, which exceed or depart from, those described by legal rules or standards (e.g., environmental protection, health protection),*

b) *conditions relating to the employment of domestic labour force and domestic entrepreneurs and suppliers, in the course of the exercise of the activity,*

c) *the minimum amount of the concession fee,*

d) *rules and collaterals with regard to the delivery and return of the property owned exclusively by the government (primary assets of the local government) provided the pursuit of the activity subject to concession requires the assignment of the possession of this property*

e) *information as to whether the sectoral Act prescribes parliamentary approval for the conclusion of a contract of concession,*

f) *the rules of price calculation of the licensed activity, including the methods and principles of defining and changing the price and charge,*

g) *any other information that the invitor deems necessary.”*

As to the evaluation of the tenders and the publicity of the concluded contracts of concession, no rules are mentioned in the ConAct or the Act I of 1988.

Section 19 sets forth that “*Unless this act provides otherwise, the provisions of the Civil Code shall apply to a contract of concession*”.

3. Act LVII of 1996, subsection (4) on unfair market behaviour and the prohibition on the restriction of competition states that “it is forbidden to acquire and utilise business secrets in an unfair way, or to inform non-competent persons about business secrets or to publicise business secrets.

4. Act IV of 1959, subsection 81 on Civil Code sets forth:” *Persons who violate mail secret, who—in an unauthorised way—get hold of private, company or business secret and reveal it or abuse in any way, violate rights related to persons.*

5. Section 300, subsection (1) of Act IV of 1978 on Penal Code sets forth that “a person who in an unauthorised way abuses, publicises business secrets to benefit by it, thus causing material damage, is committing felony and is subject to imprisonment up to 3 years.

6. Section 61, subsection (1) sets forth “*in the Hungarian Republic everyone has the right to express an open opinion, furthermore has the right to have and publicise public data.*”

7. Act LXIII of 1992 (hereinafter: Avtv.), Section 2, subsection (3) on the protection of personal data and the publicity of public data sets forth: *“data of public interest: data that do not constitute personal data and which are managed by persons or organisations providing state or local governmental services or any other services defined by law.*

Section 19 of Avtv sets forth the following: any organisation providing state or local governmental services or any other public services defined by law - including services in connection with its own management—, is obliged to provide precise and quick information to the public. It is the task of such organisations to assure that all public data managed by them are available to everyone except for cases when the data are declared by entitled entities to be state or service secrets, furthermore if the right to have access to a certain type of public data is restricted for reasons of national defence, national safety or for reasons of criminal prevention and prosecution, central financial or foreign exchange policy reasons or reasons related to foreign policy, relations with international organisations, court proceedings.

8. Act IV of 1978, Section/A, subsection f) states that *“ data managers who is secretive in connection with public data or falsifies public data, is committing felony that can lead to imprisonment up to 1 year, to public work or penalty.”*

### III. Conclusions of the Inquiry

The right to have access to public data, the freedom of/for information is a basic constitutional right. Citizens and their organisations can only keep a check on the activity of the state or municipalities if they have sufficient information on their operation. In harmony with the data protection Act, the above mentioned organs are obliged to provide all possible information. As a general rule, they should assure the access to all data managed by them.

8/2 paragraph of the Constitution should be applied also for the freedom of information:

Examples for the legal restriction of information freedom is the Act on state secrets and service secrets, or the legal provisions concerning the protection of business secrets.

The right to have information on public data and the right to have business secret can contradict each other when organs with public activity have business relations with private companies, e.g. when they engage in a Public Procurement procedure, privatisation or concession or through the process of state and municipal property management or in cases when a state or municipal budgetary subsidy or favour is granted to a private company.

State or municipal organs learn business secrets very often when they deal with asset management and when they manage public funds. In these cases the principle of publicity has priority, since the utilisation of public finances and the state economy should be transparent. Since free access

to information is a constitutional right, the right to have business secrets can not come before that. Private companies that apply for state or municipal subsidies or enter for a competition for subsidies or companies that have business relations with the state and municipality where public finances are involved, or if they manage public assets, often are exposed to the restriction of the right to have business secrets.

Through concession the state, municipality renounces the right to carry out activities (there is an official, legal itemised list of these activities) temporarily. They conclude an onerous contract (consideration contract) which assures partial share of the market monopoly. The concession fee is usually transferred to the central budget. The ConAct declares:

*When the state, municipality outsources the activity, the competition for the outsourcing activity is defined by law. Organisations or entrepreneurs should enter a competition that is defined by law and is public. The state, municipality can then select the best possible organisations or entrepreneurs that can serve the state, municipality and their community.*

It is obvious from the data protection law and also from the above mentioned regulations of the concession law that when the state, municipality concludes a concession contract, it disposes over public funds. This explains why the content of this contract can not be considered as business secret, given the present system of information right.

In connection with the publicity of privatisation contracts and results of competitions for various budgetary subsidies and favours I have made some inquiries (528/A/1996., 503/K/1997., 227/K/1998. no. cases), and I still hold the opinion that based on the quoted laws, information found in a concession contract are public information and should be available to everyone.

Any agreement worded in the contract of concession concerning the obligation of the state, municipality to hold the content of the concession contract in secret contradicts Section 2, subsection(3) and section 19, of Avtv

Based on the quoted laws of Avtv. the obligation of publicity is binding not only for the content of the contract but also for the result of the competition. But at the same time, it is in the interest of those whose work did not win on the competition that their business data do not get publicised. The state, local government do not have the confidentiality obligation if the applicants reveal their business secrets when they appeal because they have complaints in connection with the results.

For legal safety it would be advisable to amend the ConAct so that all the participants: the state, municipality that announce the competition, the applicants that enter the competition would have clear knowledge as to what data can be public and what data should be public. (A good example for the clear, legal regulation is the 1996/I. Act on radio and television. The 96th paragraph (4th) section of this act defines one by one which data of a concession contract are subject to publicity after a concession contract was concluded for the provision of radio and television services).

## IV. Recommendation

Based on the above mentioned, I propose the following:

- I request the Minister of Transportation, Telecommunications and Water Management to assure that all data are public to the petitioners or any other parties that hold interest in connection with the content of the concession contract concluded between the Ministry of Transportation, Telecommunications and Water Management and the First Hungarian Concession Motorway Rt. (ELMKA) for the construction and operation of M1/M5 motorways.
- I request the Minister of Justice to initiate an amendment of act XVI of 1991 on concession so that interested participants could practice their constitutional right to have access to all public data.

Budapest, 1998. november

Dr. László Majtényi  
Data Protection Commissioner

## NOTES

- <sup>1</sup> Law on Concession, 1998, Law No. 219, Article 2.
- <sup>2</sup> Some interviewees noted that this approach for park maintenance improved performance by bringing about competition among the various park maintenance contractors to provide the best quality service. One district representative noted, with regret, that his district had significantly limited its future options in contracting street maintenance services, by virtue of its sale of its maintenance equipment to one company.
- <sup>3</sup> Interview with City Staff, February 2001.
- <sup>4</sup> Council Directive, 92/50/EEC, Article 1(a) (18 June 1992).
- <sup>5</sup> Arrowsmith, Sue, *Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?*, *Common Market Law Review* Vol. 37, 709, 713 (2000).
- <sup>6</sup> Council Directive, 92/50/EEC, Article 1(a)(iii) (18 June 1992).
- <sup>7</sup> Commission of the European Communities, *Commission Interpretative Communication on concessions under Community law*, Brussels, 12.4.2000, p. 15 (Official Journal of the European Communities, Vol. 43, 29 April 2000 (2000/C121/02), ([http://europa.eu.int/comm./internal\\_market/en/publproc/general/conc2.htm](http://europa.eu.int/comm./internal_market/en/publproc/general/conc2.htm)).

- <sup>8</sup> Commission of the European Communities, *Commission Interpretative Communication on concessions under Community law*, Brussels, 12.4.2000, p. 16.
- <sup>9</sup> Hungary, Act XL of 1995, Introduction.
- <sup>10</sup> Ordinance No. 118. (1999).
- <sup>11</sup> Act 199 of 1994, published in English by Trade Links, s.r.o., Prague (Miscellaneous Acts in 2000).
- <sup>12</sup> Act 199, Sec. 1 (r) and (s).
- <sup>13</sup> Section 37.
- <sup>14</sup> Section 37(2).
- <sup>15</sup> Act XII of 1995.
- <sup>16</sup> Act XL of 1995, Sec. 10(e).
- <sup>17</sup> Commission of the European Communities, “Commission Opinion on Hungary’s Application for Membership of the European Union”, (Brussels, 15.07.97; COM (97) 2001 final).
- <sup>18</sup> Ordinance No. 118 of 1999.
- <sup>19</sup> Ordinance No. 118, Sec. 2.
- <sup>20</sup> 1999, Act 263, (on the internet in English: [www.uvo.gov.sk/vo\\_e.htm](http://www.uvo.gov.sk/vo_e.htm)).
- <sup>21</sup> 1999, Act 263, Article 2, Sec. 3. v & x.
- <sup>22</sup> Regional Environmental Center, *Doors to Democracy*, pp. 158–159, Szentendre, Hungary, 1998.
- <sup>23</sup> Act No. LXIII of 1992. For a discussion of the Act and related background information see Hungarian Civil Liberties Union, *Data Protection and Freedom of Information*, Budapest: 1997. The report is published in English and includes a translation of the Data Protection Act.
- <sup>24</sup> Article 19, Sec. 3.
- <sup>25</sup> Article 2, Sec. 3.
- <sup>26</sup> Article 19, Sec. 4. One exception to the above rules is that: “Unless an Act provides otherwise, data generated for internal use and in connection with the preparation of decisions shall not be public within thirty years following their inception.” (Article LXIII of 1992, Sec. 19(5)). However, according to the legal experts interviewed, the apparent intent of this section is to protect drafts of proposed regulation prepared by a ministry, rather than to protect commercial information.
- <sup>27</sup> Act IV of 1978, Sec. 300.
- <sup>28</sup> Case No. 528/A/1996. (28 November 1996).

- <sup>29</sup> Data Protection Commissioner Recommendation Relating to the Publicity of Concession Contracts, Nov. 1998.
- <sup>30</sup> Law No. 69/1991, Article 49, sec. i.
- <sup>31</sup> For background information on freedom of information in Romania see Andreescu, Gabriel; Stefanescu, Manuela; Weber, Renate, *Access to Information in Romania*, Center for Human Rights, Bucharest: 1996.
- <sup>32</sup> Ordinance No. 118 (1999), article 44 (as modified Ordinance No. 202 (1999) published in Official Monitor of Romania, Pat I, No. 431 (31.VIII.1999).
- <sup>33</sup> Article 26 (Sec. 5).
- <sup>34</sup> Section 10(1).
- <sup>35</sup> Section 10(2).
- <sup>36</sup> 1998, Law No. 228.
- <sup>37</sup> *Id.*, Article 7.
- <sup>38</sup> For discussion see McDonagh, *Freedom of information developments in Europe*, from the *Freedom of Information Review*, pp. 58–61 Australia: August 1995.
- <sup>39</sup> 70th Session, 29 April 1982.
- <sup>40</sup> Declaration, *ibid*, Sec. II(c).
- <sup>41</sup> 93/730/EC Supplemented by Council Decision 93/731/EC.
- <sup>42</sup> Council Directive 90/313/EEC. For extensive analysis of access to environmental information see ed. Hallo, *Access to Environmental Information in Europe* (1996, Kluwer Law International) and Regional Environmental Center, *Doors to Democracy* (1998, Szentendre, Hungary).
- <sup>43</sup> *Federal Law Gazette* I 1997/75, (Reissue), Sec. 56.
- <sup>44</sup> *Code Administratif*, Loi no. 78–753 du 17 juillet 1978, modified by Loi no. 2000–321 (12 April 2000) ([www.cada.fr](http://www.cada.fr)).
- <sup>45</sup> *Id.*, Sec. 6.
- <sup>46</sup> Commission d’Access aux Documents Administratifs, *Guide de l’acces aux documents administratifs*, (3d. Edition 1998).
- <sup>47</sup> Commission d’acces aux documents administratifs, 9e rapport d’activite, p. 15.
- <sup>48</sup> Commission d’acces aux documents administratifs, 9e rapport d’activite, p. 13.
- <sup>49</sup> However, three German states (Brandenburg, Berlin, and Schleswig-Holstein) have adopted freedom of information laws.
- <sup>50</sup> Laws of 2000, Chapter 36.
- <sup>51</sup> Laws of 2000, Chapter 36, Sec. 43.

- 52 Open Government, *Code of Practice on Access to Government Information*, Guidance on Interpretation, Cabinet Office, 1994, Paragraph 13.3.
- 53 Freedom of Press Act, Ch.2. On the Public Nature of Official Documents. Article 2.
- 54 *Ibid*, Article 3.
- 55 Access to Information Act, Sec. 20(1).
- 56 *Air Atonabee Limited v. Minister of Transport*, 27 F.T.R. 194, 207 (1989).
- 57 5 U.S. Code Ann. Sec. 9(b)(4). For discussion of the commercial exemption under the Freedom Information Act see American Civil Liberties Union, “Exemption 4, Business Information”, *Litigation under the Federal Government Open Government Laws* (Ch. 6, pp. 75–85, 1992); Kuersteiner and Herbach, “The Freedom of Information Act: An Examination of the Commercial or Financial Exemption”, 16 *Santa Clara Law Review* 193–213 (1976).
- 58 Public Citizen Health Research Group v. Federal Drug Administration, 704 F.2d. 1280, 1288 (D.C. Cir. 1983).
- 59 (Report prepared with British Government Research Fellowship). (Contact address for publication, rsb@clara.net). Also see Baxter, “Public Access to Business Information Held by Government”, *The Journal of Business Law*, May 1997, pp. 199–219.
- 60 1999, Law No. 118, Article 55, (Official Monitor of Romania, Part I, Nr.431/31.VIII.1999.
- 61 Act XL of 1995, Sec. 31.
- 62 Administrative Procedure Code, No. 71 (1967) as amended by No. 29 (2000). Sec. 9 (1).
- 63 Act 283 of 1993, Sec. 24 (1).
- 64 Act LXV of 1990, Sec. 14 (2).
- 65 1992 Act. 23, Section 21(5)(a).
- 66 See e.g. European Parliament, Directorate General for Research, “Measures to Prevent Corruption in EU Member States” (Legal Affairs Series, JURI 101, 03-1998) .
- 67 Recommendation No. R (2000) 10.
- 68 Acts of 2000, Ch. 22, Local Government Act of 2000.
- 69 Law No. 91–3, Art. 1 (1991) creates the committee.
- 70 The Danish Public Administration Act. Act No. 571, Part 2 (Disqualification) (19 January 2000).
- 71 The complete texts of most, if not all, U.S. state laws are available on the internet. In addition, state agencies which are responsible for enforcing conflict of interest laws commonly prepare reports which summarize their laws, which are also available on the internet.
- 72 Kennedy and Beck, “Interest of Public Officers in Contracts Prohibited by Law”, *Southern California Law Review*, Vol. 28, pp. 335–347 (1955); “Conflict of Interest in Public

Contracts in California”, *California Law Review*, Vol. 44, pp. 355–377 (1956); Kaufman and Widiss, “The California Conflict of Interest Laws”, *Southern California Law Review*, Vol. 36, pp.186–207 (1963); “Pennsylvania’s Public Official and Employee Ethics Law of 1989: Strengthening the Faith and Confidence of the People of the State in Their Government?”, *Dickinson Law Review*, Vol. 94, pp. 997–1029 (1990); Davies, “Article 18 of New York’s General Municipal Law: The State Conflicts of Interest Law for Municipal Officials”, *Albany Law Review*, Vol. 59, pp. 1321–1351 (1996); DeSario and Freel, “Ohio Ethics Law Reforms: Tracing the Political and Legal Implications”, *Akron Law Review*, Vol. 30, pp. 129–152 (1996); Lawrence, “The Proposed Michigan Government Ethics Act of 1999: Providing Guidance to Michigan Public Officials and Employees”, *University of Detroit Mercy Law Review*, Vol. 76, pp. 411–482 (1999).

<sup>73</sup> For background about transparency issues in Romania see Centre for Human Right, “Access to Information in Romania” (1996).

