



ARTICLE

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Elections for the Future of Administrative Concessions

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The recently announced waiver of Castor's concessionary authorization to explode underground stocks of natural gas brings various matters of importance to the table, with regards to legal regulations on concessions, the responsibility of the State to create concessions without sufficiently evaluating the technical (and economic) risks associated with them, the processes of negotiation between the State and the candidate concession companies and, definitively, the sense of a model where the State (that's to say, all citizens) are apparently always the ones to suffer the consequences.

The unfortunate history of the storage of Castor gas is sufficiently well known, so we will not repeat it. It should certainly be remembered that the initial idea was not a bad one, and that it could even be considered premonitory, in light of subsequent international events (Europe's heavy reliance on the provision of Russian gas, in current socio-political conditions in terms of relations with Russia) as they would have helped Spain to become a gas storage hub, offering an alternative supply from the South of Europe, thus giving a use to the surplus re-gasification capacity that Spain currently has.

An initial reflection is that it is necessary to provide better oversight and transparency, and mechanisms for explicit political responsibility, in the creation of concessions where special circumstances arise, such as assets that require technologies without prior commercial backgrounds in Spain, or which have been insufficiently tested, or those which are linked to infrastructures that have to be incorporated into transport networks with high saturation

levels. Such would be the case for the concessions on radial toll motorways that in many cases copied existing dual-carriageways, instead of solving Madrid's access problems (that's to say, the traffic jams in the last few kilometres before entering and exiting the city).

Secondly, what must also be provided with better transparency are all phases of the negotiation process between the State and the candidate concession companies. Along these lines, it is right for the Law on Transparency (Law 19/2012, from the 9th of December) to require the Government to make all contracts public, indicating the scope, duration, the amount of bids and awards, the procedure for its conclusion, the instruments via which, if any, it was publicized, the number of bidders participating in the procedure and the identity of the winner, as well as any amendments to the contract. Equally subject to publication will be the decision to waive the contracts. It is now up to the company to be vigilant in complying with this duty and, where appropriate, with the relevant responsibilities.

And thirdly: it is necessary to update the obsolete regulations on concessions, based on a model in which the figure of the concession is assimilated with that of a bondholder, and it is the State (again that's to say, all citizens) who assumes the business venture and the risk, and therefore the one who ends up suffering the consequences, perhaps for the apparent tendency of many courts to consider the patrimonial responsibility of the Government as a bottomless pit and the State as a kind of supportive universal insurer of however many damages are generated in the public periphery.

There was a time in the past where there was the possible risk of a shortage of offers, and the concessions regulation had to facilitate a lot of things, as well as one of its core principles being the so-called “economic balance of the concession”.

Today we live in a very different era, and even without the shortage of public tenders caused from the global economic crisis practically guaranteeing an influx of offers, infrastructure companies (not just Spanish ones) have been globalized, so it is very difficult, if the law is amended to modify or even eliminate the

principle of the economic balance of concessions, for there to be a case in which a tender must be declared void for lack of offers. There will always be multinationals, including Chinese or Indian ones, to make competitive offers. And if not even this kind of company makes offers in a tender, it will be thought that the State or convening authority has made a mistake in the economic calculations.

It will therefore also be necessary for the future to revise rules that are, ultimately, extraordinarily in favour of the concessions, backfiring to be harmful to general interests.

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