

IN-HOUSE AWARD OF CONCESSION CONTRACTS: ASSESSMENT OF ECONOMIC AND SOCIAL ADEQUACY

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Abstract

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The Directive 2014/23/EU established the principle of free administration by national, regional and local authorities in conformity with national and the European Union law. According to the principle, the authorities can decide how to manage the works or services to ensure a high level of quality, safety, affordability, equal opportunity access and user rights. This principle allows an in-house award of concession contracts that requires an economic assessment of the adequacy of the offer and the benefits of the chosen management for the community. Given the complexity of the assessment, the scientific literature requires an address to define economic fairness and the benefits of the chosen management for the community. The paper aims to define an approach useful for establishing the economic congruity and community benefits for direct awards to in-house companies. This paper conducts a systematic legislation review of a European country, Italy. This research reviews the main Italian legislation following the systematic review proposed by Tranfield et al. (2003), which is one of the most recognized, tested and validated methods for literature review used in scientific studies. The results highlight an integrated approach for establishing and reporting the economic adequacy and benefits of the chosen management as well as for comparing the pricing and benefits of the works or services directly awarded. The study gives a practical contribution to public authorities developing a guideline useful for an integrated assessment of the economic congruity and community benefits for direct awards to in-house companies; furthermore, this study supports the scientific literature through a framework that summarizes the main legislation.

Keywords: Public Contracts, Public Sector, Public Private Partnership, Economic Assessment, Social Assessment, Innovative Approach

Authors' individual contribution: Conceptualisation — E.S.; Methodology — E.S.; Validation — E.S., A.R., G.G., and A.S.; Formal Analysis — E.S. and A.R.; Investigation — E.S.; Writing — Original Draft — E.S.; Writing — Review & Editing — E.S.; Visualization — E.S.; Supervision — G.G. and A.S.; Project Administration — G.G. and A.S.

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1. INTRODUCTION

Regarding the award of concession contracts, Article 2, comma 1, of the Directive 2014/23/EU of the European Parliament and of the Council of February 26, 2014 recognizes that “*the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services. Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators*” (The European Union, 2014, Art. 2).

The use of direct assignment in the in-house providing mode requires an overall assessment of the economic aspects, referring to the suitability of the offer and the benefits for the community of the chosen direction. A report should include this assessment, which justifies the direct assignment to in-house organizations and the reasons for the decision not to use the market (The European Union, 2014).

The rationale for an in-house award of concession contracts involves a complex process that results in the creation of public value. This justification requires a comparative investigation aimed at determining the economic and social benefits of direct assignment compared to market adoption.

The implementation of the Directive 2014/23 EU requires knowledge of the definition of a concession from both a legal and technical perspective. The literature defines award criteria that must be followed by entities awarding concessions (Bulum et al., 2016). For example, Bulum et al. (2016) identified seven criteria (see Appendix A, Table A.1).

Although numerous studies have investigated this topic (Bulum et al., 2016; Natali, 2021; Ferk et al., 2019), the conceptual basis of Directive 2014/23/EU is uncertain and dysfunctional, which leads the EU member states to apply the concession rules in different ways (Kitsos, 2018; Vornicu, 2016). Given the great challenge of the process, the scientific literature needs a standard that can be used to define economic fairness and benefits for the community of the chosen management (Telles, 2016).

This paper investigates the European Country of Italy to determine the aspects useful for establishing the economic congruity of the offer of the in-house companies and the benefits for the community of the chosen management. It responds to the following research question:

RQ: What are the aspects useful for establishing the economic and social congruity of the offer of the in-house companies?

This paper determines the aspects useful for establishing the economic and social congruity of the offer and develops an integrated approach for establishing and reporting the economic adequacy of the in-house organizations and the benefits of the chosen management for the community of the service object of the direct assignment.

The practical and theoretical relevance of the study allows an integrated assessment of economic congruity and community benefits for direct awards to in-house companies based on the main legislation. Moreover, this study gives a conceptual framework for the main regulations.

This article is organized as follows. Section 2 summarizes the research background on the direct award of the public contract to in-house companies in Italy. Section 3 explains the method used to develop this research. Section 4 highlights the results and the Section 5 proposes and discusses a guideline for the assessment of social and economic adequacy. Finally, the last Section 6 summarizes the results, contributions, implications, and limitations of the study.

2. RESEARCH BACKGROUND

The Directive 2014/23/EU of the European Parliament and of the Council was implemented in Italy by Legislative Decree No. 50 of April 18, 2016, updated by Legislative Decree No. 56 of April 19, 2017. According to Article 5 of Legislative Decree No. 50 of April 18, 2016, the list of contracting authorities and contracting entities that operate through direct assignments towards their own in-house companies was established. In-house organizations are companies over which a public administration exercises similar control or several administrations exercise similar joint control and in which the participation of private capital is limited by the same law, as specified in Legislative Decree No. 175/2016. In Italy, the National Anti-Corruption Authority (ANAC) holds the list of contracting authorities and contracting entities, as specified in Art. 192, paragraph 1, of Legislative Decree No. 50/2016.

The legislator has established that when the contracting authority decides to directly award a service available on the market in a competitive regime, the contracting authority must fulfil certain obligations (Bovis, 2016; Burnett, 2014). Article 5 of Legislative Decree No. 50/2016 establishes the conditions that allow recourse to direct assignment in the in-house providing mode. Article 192 of Legislative Decree No. 50/2016 establishes that for the in-house assignment of a contract concerning services available on the market in a competitive regime, the contracting authorities carry out a preventive assessment of the economic adequacy of the offer of the in-house subjects. Considering the object and value of the service, the contracting authority must motivate the assignment of the reasons for the lack of recourse to the market, as well as the benefits for the community of the chosen form of management, also concerning the objectives of universality and sociality, efficiency, cost-effectiveness, quality of service and optimal use of public resources (Legislative Decree No. 50, 2016).

As established by Art. 34 of Legislative Decree No. 179/2012, converted into Law No. 221/2012, the contracting authority for the assignment of the service must draw up a report with the reasons for the existence of the requisites envisaged by the European law for the chosen assignment and define the obligations of the service, indicating any economic compensation. The report must allow

equality between operators, describe the cost-effectiveness of management, and guarantee adequate information to the community of reference through the publication of the information on the website of the awarding body (Decree Law No.18, 2012). This is confirmed by Art.192, paragraph 3, of Legislative Decree No. 50/2016 and subsequent amendments. The report plays a key role in the direct awarding of a public contract by a public authority to its in-house company.

This report does not have a predetermined scheme established by the legislator; the contracting authority can develop and organize it independently. The report should represent the work or service and represent it through key performance indicators that demonstrate the cost-effectiveness of the choice of the contracting authority. The document must also describe the benefits to the community of the chosen management (ANAC, 2021). Through the report, the contracting authority demonstrates the convenience of the economic conditions offered by the market; it allows control of the choice in terms of administrative efficiency and the rational use of public resources to prevent a reduction in competition to the detriment of businesses and citizens. The contracting station chooses to identify the best management of the service for the territorial context of reference to protect the general interest declined through objectives of "universality and sociality, efficiency, cost-effectiveness, and quality of the service" (Council of State, 2019). The key performance indicators allow an in-depth economic-management analysis based on objective data to evaluate and compare economic convenience, efficiency, and quality of service with other players (Council of State, 2021a).

Judicial bodies have made several rulings on the motivational assumptions behind a public body's decision to opt for an in-house company, over which it has control, for the assignment of services. As underscored by these jurisdictional bodies, contracting authorities must adhere to Article 192 of Legislative Decree No. 50/2016. However, they often only consider the costs of service management (Regional Administrative Court (T.A.R.) Calabria, Catanzaro, 2021). It has been noted that costs could be higher in the case of assignment to a company owned by public entities. It is, therefore, necessary to avoid misunderstandings arising from a partial and sectoral view of the economic and administrative effects of in-house provision (Terrei, 2021).

The suitability of in-house assignment of services need not be evaluated solely based on the service entrusted but also from a global perspective on public service management to achieve optimal allocation of public resources. The in-house award of concession contracts for services may be legitimately preferred over outsourcing, even if in-house production costs are higher. In this case, the in-house award of concession contracts should enhance the efficiency or overall quality of the in-house services rendered. For example, the profitability of one service could cover the costs of another offered at a loss or enable overall economies of scale (ANAC, 2021). The choice of awarding a service in-house should be explained through a report that also outlines the benefits for

the community of the chosen management (ANAC, 2021), such as the possibility of restructuring an in-house company or ensuring employment levels. In some cases, an uneconomical in-house award of concession contracts could result in the optimal allocation of the administration's economic resources (Ruberto, 2021).

Jurisprudence considers in-house award of concession contracts a lower step than outsourcing, except for certain cases related to specific public services where an in-house assignment is considered an excellent alternative to the market (Regional Administrative Court (T.A.R.) Genoa, Liguria, 2020). Numerous rulings require a reinforced and explanatory motivation for the choice of in-house assignment. The Council of State recently stated that the in-house assignment of services available on the market is subject to two-fold conditions (Council of State, 2020a):

a) The first condition requires explaining the exclusion of recourse to the market. It involves demonstrating the "failure of the market" for reasons relating to objectives of universality and sociality, efficiency, cost-effectiveness, and quality of service as well as optimal use of public resources (Legislative Decree No. 50, 2016), which the in-house company guarantees;

b) The second condition requires defining the benefits for the community associated with the option for in-house assignment. The Italian legal system moves from an orientation of disfavour towards direct assignments under an inter-organizational delegation regime, relegating them to a subordinate and exceptional ambit concerning the previous hypothesis of competition through public tender between companies (Council of State, 2021a).

The self-production of public authorities with an assignment to in-house companies can be attributed to the different organizational choices made for the contracting station, for example, for the needs of speed, efficiency, and operational effectiveness of public administrations in realizing public investments (Council of State, 2021b).

The contracting authorities that entrust in-house companies have gained significant experience in the evaluation of concession contracts to in-house awards. However, some great events such as COVID-19 and Russia-Ukraine war have also led to significant changes in the management of public procurement which should be reformed (Arrowsmith et al., 2021; Pircher, 2022). This matter presents a theoretical and practical gap, that is the lack of approaches able to address the assessment of the cost and social adequacy (Telles, 2016). The literature and the contracting authorities need a holistic and integrated approach, which can support the assessment of the cost and social adequacy.

The following section describes the method adopted to develop an integrated approach that includes all the requirements of the EU Directive and national regulations (Legislative Decree No. 50, 2016).

3. METHODOLOGY

This paper conducts a systematic review of Italian legislation (Tranfield et al., 2003). The researchers followed the method proposed by Tranfield et al.

(2003), which is one of the most recognized, tested and validated methods for literature review used by the scientific community in economic and management studies (Sardi et al., 2020).

As suggested by Tranfield et al. (2003), the research group is multidisciplinary, comprising jurists, economists, administrators, technicians, and consultants operating in the relevant sector. Through 22 meetings, the research group planned the review, identified the keywords for selecting the judgments related to in-house assignments, and developed an approach for evaluating economic adequacy and validating the research process.

The researchers implemented the four steps suggested by Tranfield et al. (2003) to conduct a replicable, transparent, and scientific review. The steps of the systematic review were as follows:

- Step 1. Planning the review, identifying keywords and defining selection criteria.
- Step 2. Extraction of documents relevant to the research.
- Step 3. Classification of information.
- Step 4. Discussion and validation of results.

3.1. Step 1: Planning the review, identifying keywords and defining selection criteria

The research group planned the revision of the legislation by identifying three documents and a source useful for the analysis:

1. Document: Handbook of the reasons for the chosen management (Observatory of Local Public Services, 2012);
2. Document: Code of public contracts (Legislative Decree 50, 2016);
3. Document: Guidelines for in-house public awarding of contracts for works and services (ANAC, 2021);
4. Source: Database of the judgments of the Council of State.

The research group also identified the keywords used for the selection of the judgments of the Council of State relating to in-house assignments. The keywords selected were “award” and “in-house”. A systematic review of the content of the Council of State highlighted the interpretations of the judges relating to appeals for direct assignments to in-house companies. As reported by the official web page of the Administrative Justice¹, the Council of State, the Council of Administrative Justice for the Sicilian Region and the Regional Administrative Courts are the bodies of the Italian administrative justice. The Administrative Courts judge in the first degree, while the Council of State and the Council of Administrative Justice for the Sicilian Region judge in appeal grade. The database on the official website of the Administrative Justice made this possible, as the website collects all the statements from the Council of State. The criteria used for the search were the keywords “award” and “in-house”, the type of provision, the location and the reference years (see Table 1). The search was completed on October 20, 2022.

Table 1. Selection criteria for the judgments of the Council of State

Description	Criterion
Database	https://www.giustizia-amministrativa.it
Keyword	In-house award
Provision	Judgments of the Council of State
Year	From 2020 to 2022

3.2. Step 2: Extraction of documents relevant to the research

In addition to the documents selected, the second step identified the judgment from the Council of State that were useful for the research. The search identified 121 sentences. After a careful reading of the sentences, the researchers selected 26 sentences related to the purpose of the research and the various regional administrative courts on direct assignments to in-house subjects. The analysis of the judgments allows the collection of the following information:

- appellant;
- defendant;
- reasons for the appeal;
- result of the sentence.

3.3. Step 3: Classification of information

The analysis of the documents and sentences from the Council of State identified the information to be included in the assessment of the economic adequacy of the in-house subjects and the benefits for the community of the chosen management. It also identified the aspects to be included in the assessment.

3.4. Step 4: Discussion and validation of results

The researchers analyzed the results to define the aspects useful for establishing the economic congruity of the offer of the in-house companies and the benefits for the community of the chosen management. This step highlighted a facsimile for assessment of in-house award of concession contracts.

4. RESULTS

The results of the systematic review of the legislation highlight the aspects that should be included in the integrated approach to establish the economic adequacy of the offer of in-house subjects and to define the social benefits. Below are the results that emerged from the study.

1. The handbook of the explanatory report on the reasons and requirements envisaged for the chosen form of assignment (Observatory of Local Public Services, 2012) introduces a format that the Ministry for Economic Development and the National Agency for Inward Investment and Economic Development, namely Invitalia, developed to facilitate the drafting of the report under Legislative Decree No. 179 of October 18, 2012, Art. 34, paragraphs 20 and 21. Authorities awarding local public services of economic importance must justify the reasons for the awards, demonstrate the existence of the requirements established by European law for that specific form of assignment,

¹ www.giustizia-amministrativa.it

and specify the public service and universal service obligations, indicating the corresponding economic compensation, if any. The proposed format includes the following information.

- information on in-house award of concession contracts;
- information on administrative officer in charge of the award;
- information on legislative framework;
- information on contracts, services or supplies characteristics and public and universal service obligations;
- information on economic reason for the choice.

The code of public contracts (Legislative Decree No. 50, 2016), in particular Art. 192 of Legislative Decree No. 50/2016, defines that for the in-house assignment of a contract concerning services available on the market in a competitive regime, the contracting authorities must assess the economic adequacy of the offer of the in-house subjects. This assessment includes the following information:

- information on contracts, services or supplies object;
- information on contracts, services or supplies value;
- information on economic benefit;
- information on social benefit (universality, efficiency, cost-effectiveness and quality of service and optimal use of public resources).

2. The guideline for in-house public awarding of contracts for works, services or supplies requires the following information:

- information on the context of contracts, services or supplies object of concession contracts (e.g., activities present on the market in a competitive regime);
- information on reasons for not resorting to the market;
- information on verification of the presence on the labour market, service or supply to be entrusted;
- information on economic fairness assessment;
- information on social benefit assessment.

The economic fairness assessment of the offer includes the object and value of the service. It considers the cost of the work, service, or supply, the methods of performance, and previous experiences in terms of efficiency and effectiveness. It presupposes current knowledge of the context and the works, services, or supplies offered on the territory (by private subjects and in-house organizations) and the average prices charged for the same or similar services, meaning similar and comparable services concerning those covered by the assignment. Contracting authorities can adopt adequate benchmarks for economic assessment. They can compare the performance of in-house organizations with other similar companies with efficient management. The benchmark can compare the standard costs, the reference prices elaborated by sector authorities, prices of the agreements, official price lists, and values of identical or similar contracts, services, or supplies. Benchmark information can be acquired through an authoritative website, market research, and quotations. In order to obtain a clear and verifiable assessment, the contracting authority must indicate

all the information useful for comparing the various competitors concerning the cost of labour, service, or supply offered by the in-house organization. The assessment indicates the cost items used for the benchmark, for instance, direct and indirect costs.

The contracting authority must highlight the benefits for the community that can be achieved by direct assignment to the in-house body, making a comparative comparison with the objectives that can be pursued through recourse to the market. It evaluates the following aspects:

- *Universality and sociability.* The benefits for the community also include network effects that determine growing advantages due to the increase in the number of users of the service or the use of homogeneous and interconnected systems. It includes:

- equality towards all users of a territory;
- impartiality in terms of physical and economic accessibility;
- service continuity;
- employment stability.

- *Efficiency.* The efficiency of the chosen management is evaluated based on the comparison between the available resources and the expected results.

- *Effectiveness.* The management cost-effectiveness can be assessed based on the strategies adopted; for instance, the use of economies of scale. The objectives of the assignment allow the assessment of activity effectiveness.

- *Quality.* The quality of the service offered is assessed concerning the type, modality and execution times defined in the contract, which defines the standards of the service.

3. The analysis of judgments of the Council of State on direct awards to in-house companies highlighted the interpretations of the judges relating to appeals for direct awards to in-house companies. It allowed identifying the main aspects useful to develop a holistic and integrated assessment (see Appendix B, Table B.1). The main aspects include:

- legislative;
- economic;
- quality;
- efficiency-effectiveness;
- social.

5. DISCUSSION

The Directive 2014/23/EU and national public procurement codes have allowed excluding certain types of companies from the application of public procedures, however, public administrations must demonstrate the economic adequacy of the offer and the social benefits through a comprehensive assessment. This assessment should compare the cost of labour, service or supply, performance and previous experience in terms of efficiency and effectiveness of companies on the market. It requires the acquisition of information on the context of the assignment and on the works, services or supplies offered in the same territorial area and the average prices charged for the services. As a reference element for the assessment of economic adequacy, the public administration compares the performance of the in-house body

with that of other companies. The social evaluation compares the benefits for the community that can be achieved through direct assignment to the in-house organization concerning recourse to the market.

The literature and some great events such as COVID-19 and Russia-Ukraine war have also conducted significant changes in this sector (Arrowsmith et al., 2021; Pircher, 2022), which required approaches for the assessment of the cost and social adequacy (Telles, 2016). Through the definition of the main aspects useful for the assessment of economic and social congruity of the offer of the in-house companies, the results of the research favoured the development of a facsimile for the assessment of direct awards to in-house organizations (see Appendix C). This facsimile draws inspiration from the handbook of the explanatory report of the reasons and existence of the requisites envisaged for the chosen form of assignment according to Art. 34 Legislative Decree No. 179/2012 published by the Observatory of Local Public Services (2012).

The facsimile includes several sections: two general sections (Introduction and Concession contract background), three evaluation sections related to legislation, economic and social aspects and, finally, the results of the award of the public contract.

The Introduction section describes the main characteristics of the administrative officer responsible for the assignment, the internal contractor and the public procurement covered by the report. The succeeding section, namely Concession contract background, explores the factors related to the choice between the competitive award and direct award; the factors investigated are environmental context (uncertainty and variability), market conditions and in-house award of concession contract characteristics such as instance technical, qualitative and quantitative standards work or service assigned. Furthermore, this section highlights some important information on the relationship between the awardee and awarder; for example, the timing and monitoring of work or service assigned. The following three sections highlight the hard core of the economic and social assessment of direct assignment to the in-house company.

The first assessment section, namely the Legislative section, includes the legislation related to the in-house award of the concession contract; it highlights European regulation, national legislation, regional legislation and other key legislation. It verifies and validates the assignment procedure and the specific rules relating to the work or contract covered by the public contract.

The second assessment section, namely the Economic section, introduces the determination of the basic calculation for evaluating the fairness of the economic offer for the activities available on the market under a competitive regime and the benchmark analysis with companies that produce the same work or service. The determination of the calculation basis favours the assessment of the economic adequacy of the activities available on the market that the authorities entrust under the legislation. The legislation, the company's statute and other corporate documents, including

analytical accounting, determine the calculation. For example, analytical accounting allows for the definition of costs to projects and activities. The determination of the calculation starts from the determination of the parameters useful for the comparison and analysis of the financial statements from at least the last three years and the national collective labour agreement. For example, the parameters useful for the calculation basis can be the employee cost per hour, structural cost, internal cost per hour and earnings before interests taxes depreciation and amortization (EBITDA). EBITDA is a profitability indicator that highlights a company's income based only on its operational management without considering financial management, tax management, depreciation of assets and depreciation; this indicator is suitable for comparing the results of different companies operating in the same sector. EBITDA is also used instead of operating income, as it is not tied to particular budgetary policies, such as the depreciation policy (Ferrero et al., 2003). Finally, through benchmark analysis this section compares the work or service performance of an in-house organization with its competitors; benchmark analysis creates a comparison between the activity under study and a certain number of other companies with similar characteristics through the use of specific metrics useful for comparison. The benchmark analysis is used to compare performance with potential competitors over a given period. The performances to consider are those indicated previously. The benchmark analysis compares a series of information such as the gross cost of personnel per hour, the cost of labour per capita and the internal cost per hour to assess the economic adequacy of in-house award of concession contracts.

The third assessment section, namely the Social section, defines the main benefits for the community. According to national legislation, it highlights the results obtained regarding effectiveness, universality and sociality, efficiency, cost-effectiveness and quality of the service provided, as well as the optimal use of public resources. The facsimile highlights an example of a measurement system for the assessment of social benefits (see Appendix C).

Finally, the conclusion section summarizes the main information of the assessment of in-house award of concession contracts and highlights the final decision.

6. CONCLUSION

This research introduced an important topic for the scientific literature and public authorities: the consequences of Directive 2014/23/EU, which established the principle of free administration by national, regional and local authorities in conformity with national and the European Union law. This principle allows for the direct award of public contracts to in-house organizations. According to this directive, authorities can award works or services directly to in-house organizations while ensuring universality, sociability, efficiency, cost-effectiveness and quality of work/service.

This paper identifies a useful approach for establishing and reporting the economic adequacy

and social benefits for the community of the chosen management. This approach allows stakeholders to compare the pricing and social benefits for the directly awarded works and services. The approach proposed favors a report able to define universality, sociability, efficiency, cost-effectiveness and quality of work and service.

The contributions of this paper are twofold. On the one hand, it determines a useful approach for public authorities to develop a guideline for establishing the economic congruity and community benefits for direct awards to in-house companies; on the other hand, it supports the scientific literature through a framework that summarizes the main legislation.

One limitation of this study is that it investigates a single EU country. It favours an in-depth knowledge of the Italian context and legislation to detect the main aspects useful for establishing the economic and social congruity of the offer of the in-house companies and support the development of an assessment facsimile.

Future research contributions may investigate other EU countries to determine the main aspects useful for establishing the economic and social congruity derived from their legislative frameworks. Furthermore, other contributions are required to compare, test, and validate the guideline proposed by this article.

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APPENDIX A

Table A.1. Award criteria for authorities awarding concessions

<i>Criteria</i>	<i>Description</i>
1	A clear and precise definition of concession based on the Court of Justice of the European Union case law.
2	Coverage of works and services concessions both in the utility sector and in the classic sector (all sectors not covered by utilities).
3	To ensure transparency and equal treatment to all economic operators, the Concessions Directive provides an obligation for contracting authorities and contracting entities to publish concession notices in the <i>Official Journal of the European Union</i> when their value is equal to or greater than a threshold prescribed in that directive.
4	An adequate solution for dealing with changes to concessions contracts during their term, especially when they are justified by unforeseen circumstances.
5	Establishment of certain obligations concerning the selection and award criteria to be followed by entities awarding concessions.
6	No standard mandatory award procedures (negotiations are always possible) but instead, the establishment of certain general guarantees aimed at ensuring transparency and equal treatment (notably, in case of negotiations).
7	Application of the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concessions covered by the Concessions Directive guarantee effective channels for challenging the award decision in court and providing minimal judicial standards which have to be observed by contracting authorities or entities.

Source: Bulum et al. (2016).

APPENDIX B

Table B.1. Judgments of the Council of State from 2020 to 2022 (Part 1)

<i>Subjects</i>	<i>Reasons for the appeal</i>	<i>Reason</i>	<i>Result</i>
<i>Appellant</i> – Atap <i>Defendant</i> – Agenzia Mobilità Piemontese <i>Against</i> – Province of Vercelli	The Council of State partially accepted judgement 5754/2022 for the following reasons. First, the judge at first instance misinterpreted the legislation, causing harm to economic operators. Second, the interpretation of the laws expresses illogical reasoning and a contradictory decision on the harmfulness of the contested measures. Third, the public service obligation cannot create a compensatory obligation for direct entrustment because the emergency local public transport services are awarded directly and as public service obligations. Fourth, the community legislation could not be derogated from national emergency legislation as requested by the defendant. Fifth, the decision of the court of first instance would be entirely flawed in the judgment because without any reasoning it had held that the provisions of Ministerial Decree 157/2018 and Resolution Art. 154/2019, which transposed the compensatory criteria established at the community level into national law, were not applicable (Council of State, 2022a).	Legal	Partially accepted
<i>Appellant</i> – Atap <i>Defendant</i> – Agenzia Mobilità Piemontese <i>Against</i> – Province of Biella, Municipality of Biella, Piedmont Region	The Council of State partially accepted judgement 5753/2022 for the following reasons. First, the judge at first instance misinterpreted the legislation, causing harm to economic operators. Second, the interpretation of the laws expresses illogical reasoning and a contradictory decision on the harmfulness of the contested measures. Third, the public service obligation cannot create a compensatory obligation for direct entrustment because the emergency local public transport services are awarded directly and as public service obligations. Fourth, the community legislation could not be derogated from national emergency legislation as requested by the defendant. Fifth, the decision of the court of first instance would be entirely flawed in the judgment because without any reasoning it had held that the provisions of Ministerial Decree 157/2018 and Resolution Art. 154/2019, which transposed the compensatory criteria established at the community level into national law, were not applicable (Council of State, 2022a).	Legal	Partially accepted
<i>Appellant</i> – Ges. Co. Ambiente <i>Defendant</i> – Ecoambiente Salerno S.p.A. EDA, Province of Salerno and Campania Region	The Council of State accepted judgment 3624/2022 for two reasons. First, the company Ges. Co. submitted a timely application for an extension of the authorization itself and challenged the deed of transfer in favour of Ecoambiente. Second, Ges. Co. is not in a state of liquidation ordered directly by law, which would result in an inability to operate Council of State, 2022b).	Legal	Accepted
<i>Appellant</i> – Municipality of Catanzaro <i>Defendant</i> – Edilcat Costruzioni S.r.l. <i>Against</i> – Catanzaro Servizi S.p.A.	The Council of State rejected judgment 3562/2022 for the following reasons. First, the Municipality of Catanzaro did not adequately justify its choice and allegedly omitted any assessment of the congruity of the in-house company's economic offer. Furthermore, the municipality allegedly failed to compare the different methods of managing the service, which made it possible to favour a method of entrusting the service considered to be residual in the regulatory system in force. Finally, it is alleged that the necessary report, according to Article 34(20) of Article No. 179 of 2012, is lacking in that there is no economic advantage for the Municipality of Catanzaro and the community in entrusting the service to its in-house company (Council of State, 2022c).	Quality Efficiency Sociality Legal	Rejected
<i>Appellant</i> – ANAV (Associazione Nazionale Autotrasporto Viaggiatori) <i>Defendant</i> – Municipality of Bari <i>Against</i> – AMTAB S.p.A.	The Council of State rejected judgment 509/2022 for the following reason. The judge explained that even if AMTAB did not qualify as an in-house company due to private capital in the company, it did not in itself preclude direct awarding if the legal conditions were met (Council of State, 2022d).	Legal	Rejected
<i>Appellant</i> – Servizi Comunali S.p.A. <i>Defendant</i> – Aprica S.p.A. <i>Against</i> – Municipality of Coccaglio and ANAC	The Council of State accepted judgement 7093/2021 for several reasons. First, the exception of inadmissibility was upheld. Furthermore, the decision to resort to in-house and corporate solutions to ensure analogous control is congruent with the offer received, financial sustainability, economic convenience, quality and efficiency of the service and describes the reasons for not resorting to the market and the benefits to the community (Council of State, 2021c).	Efficiency Effectiveness Sociality Legal	Accepted

Table B.1. Judgments of the Council of State from 2020 to 2022 (Part 2)

<i>Subjects</i>	<i>Reasons for the appeal</i>	<i>Reason</i>	<i>Result</i>
<i>Appellant</i> — Servizi Comunali S.p.A. <i>Defendant</i> — La Bico Due S.r.l. <i>Against</i> — Comune di Cologne e ANAC	The Council of State accepted judgement 7093/2022 because the Municipality of Cologne had adopted damaging behaviour by proceeding to award the service in-house without first holding a public tender. Thus, it created a lack of interest and challenge to all related acts, including the decisions of the National Anti-Corruption Agency. The municipality of Cologne adopted resolutions that precluded any possibility of aspiring to participate in a tender, proceeding with in-house without resorting to the market (Council of State, 2021d).	Sociality Efficiency	Accepted
<i>Appellant</i> — SDS S.r.l. <i>Defendant</i> — Asl Taranto <i>Against</i> — Sanitaservice Asl Ta S.r.l.	The Council of State rejected judgement 6062/2021 for various reasons. First, there was a lack of evidence regarding the well-founded legitimacy of the awarding of the service in-house. Second, the appellant company challenged the act of the Taranto Local Health Authority late in the proceedings because it had already made a final choice in favour of in-house assignment. Furthermore, Sanitaservice submitted an economic proposal and business plan describing the objective of internalization. Finally, there is no unlawfulness regarding the economic congruity in the choice of in-house awarding (Council of State, 2021e).	Efficiency Effectiveness Legal	Rejected
<i>Appellant</i> — Flash Color S.p.A. <i>Defendant</i> — Municipality of Paderno Dugnano <i>Against</i> — Ages S.r.l.	The Council of State rejected judgement 6038/2021 for two reasons. First, the application for appeal was filed late. Second, charging a parking tariff is not a reason to annul an allocation tender (Council of State, 2021f).	Social	Rejected
<i>Appellant</i> — Municipality of Albenga <i>Defendant</i> — Teknoservice S.r.l. <i>Against</i> — S.A.T. S.p.A.	The Council of State rejected judgement 5351/2021 for two reasons. Firstly, the judge did not require a comparison between the in-house model and the use of the market, but only an overall assessment of costs and benefits. The motivation was the economic and sustainability of the model. Second, the municipality's choice appears to be contradictory. On the one hand, the exception situation for not entering the market, and choosing in-house, is not present. On the other hand, it emphasized the choice not to choose the market through a specific motivational burden. The municipality explained its justifications and reinforced the reasons for choosing in-house (Council of State, 2021g)	Effectiveness Efficiency Quality	Rejected
<i>Appellant</i> — C.I.S.A. S.p.A. e Co.Ge.Am. S.c.a.r.l. <i>Defendant</i> — Apulia Region <i>Against</i> — Acquedotto Pugliese S.p.A. and AGER	The Council of State rejected judgement 4235/2021 for various reasons. First, there are no prerequisites dictated by the legislation for an administration to retain its shareholding. The region claims to have a competence related to the corporate purpose of the Aseco company, even though the municipalities have waste management. Second, there is no undue and illegitimate taking away of market share from private companies. Third, the memorandum of understanding between the company Acquedotto Pugliese S.p.A. and AGER is not unlawful (Council of State, 2021h).	Legal	Rejected
<i>Appellant</i> — S.C.T. Group S.r.l. <i>Defendant</i> — I.R.C.C.S. Policlinico San Martino <i>Against</i> — Genova Parcheggi S.p.A.	The Council of State accepted judgment 2102/2021 for the following reasons. First, the appealed judgement complies with the law. The judge expressed support for Società Genova Parcheggi's strategy because "no private operator could achieve the same integration between the two parking systems" by applying both a "dualistic" and unitary form of the object. Furthermore, the strategy makes it possible to integrate parking inside the hospital with the neighbouring city parking, which takes place through the in-house company of the Genoa City Municipality. Finally, the choice of in-house award of concession contracts is advantageous and cannot be sold on the market, obtaining the same benefit (Council of State, 2021a).	Efficiency Quality	Accepted
<i>Appellant</i> — Consorzio stabile SIS s.c.p.a. <i>Defendant</i> — Autostrade del Lazio <i>Against</i> — Webuild S.p.A. Pizzarotti S.p.A. Ghella S.p.A.	The Council of State accepted judgment 1314/2021 for several reasons. First of all, the company Autostrade del Lazio is vested with "the powers of active administration and self-defence over tender acts". Furthermore, Autostrade del Lazio does not have the power to oppose the judgment because it was not a party to the judgment. In addition, the Ministry of Infrastructure and Transport asked for an extension of the time limit for the appeal to 60 days (the law normally mandates 30 days), which the SIS stable consortium did not respect (Council of State, 2021i) with the participation of the Ministry of Infrastructure and Transport.	Legal	Accepted

Table B.1. Judgments of the Council of State from 2020 to 2022 (Part 3)

<i>Subjects</i>	<i>Reasons for the appeal</i>	<i>Reason</i>	<i>Result</i>
<i>Appellant</i> — Municipality of Naples <i>Defendant</i> — Campagna Region <i>Against</i> — Azienda Napoletana Mobilità (A.N.M.), Presidency of the Council of Ministers	The Council of State rejected judgement 1090/2021 for the following reasons. First, local public transport would not be among the fundamental functions of the municipalities. Second, it had already been stated in a previous ruling that the region manages rail transport. Third, the hierarchical decision is established by state law, rather than regional law. Fourth, the Campania Region could interfere with the principle of competition of exclusive state competence even if the contested regional law did not exclude in an absolute sense the entrusting of the service 'in house' (Council of State, 2021j).	Quality Legal	Rejected
<i>Appellant</i> — NET S.p.A. <i>Defendant</i> — Unione Territoriale Inter. Della Carnia <i>Against</i> — A&T 2000 S.p.A.	The Council of State rejected judgment 184/2021 because Friuli Venezia Giulia's Regional Law No. 20/2016 abolished the pre-existing provincial authorities, and the regional territory was reorganized through Intermunicipal Territorial Unions (UTI), which, among other things, exercised in associated form functions and competences of supra-municipal scope in favour of the associated municipalities, including the service of municipal waste collection and disposal. Therefore, NET S.p.A.'s claim of lack of competence and/or absolute lack of power on the part of the UTI in the exercise of the powers and duties pertaining exclusively and peremptorily to the latter is unacceptable (Council of State, 2021k).	Legal	Rejected
<i>Appellant</i> — Rieco S.p.A. <i>Defendant</i> — Eco.Lan S.p.A., Municipality of San Vito Chietino <i>Against</i> — ANAC	The Council of State rejected judgement 8028/2020 for the following reasons. First, there is no evidence to question the existence of analogous control. Consequently, the action of the municipalities cannot be criticized for taking the initiative to amend the articles of the statute and enter into the shareholders' agreements. Second, the company only received proposals from the municipalities, which were submitted to the municipal authorities and approved by them using reasoned resolutions of the council. Third, there was no objection to assigning the urban hygiene service directly to Eco.Lan S.p.A. approved the proposed changes to the articles of the statute with an assessment of the conditions for direct assignment, and only then was the technical-economic proposal for the management of the service formulated by the company accepted (Council of State, 2020b).	Efficiency Legal	Rejected
<i>Appellant</i> — Municipality of Lerici <i>Defendant</i> — IREN S.p.A. — ACAM Ambiente S.p.A. <i>Against</i> — La Spezia province	The Council of State rejected judgement 6655/2020, positing that the judge is not required to raise the question of the constitutional legitimacy of the rules that allow the continuation of a service originally awarded in-house when the requirements of such an award ceased to exist. It is an issue that is not relevant in this judgement because the rules are not to be applied, given the municipality's lack of jurisdiction. For the same reason, the court is not obliged to make a reference to the Court of Justice for a preliminary ruling on the conformity of the rules with European law (Council of State, 2020c).	Legal	Rejected
<i>Appellant</i> — Rieco S.p.A. <i>Defendant</i> — Municipality of Ortona, Ecolan S.p.A. <i>Against</i> — ANAC	The Council of State rejected judgment 6460/2020 for three reasons. First, it was permissible for the extraordinary commissioner to adopt the resolutions approving the awarding of the in-house service to Eco.Lan S.p.A. Second, there is no evidence that Eco.Lan took the initiative to amend the articles of the statute and enter into the shareholders' agreements. Third, the company sent proposals to the municipalities, which were submitted to the municipal authorities and approved by the municipalities through resolutions of the council (Council of State, 2020d).	Legal	Rejected
<i>Appellant</i> — Rieco S.p.A. <i>Defendant</i> — Eco.Lan S.p.A., Municipality of Lanciano <i>Against</i> — ANAC	The Council of State rejected judgement 6459/2020 for three reasons. Firstly, there is no evidence that Eco.Lan took the initiative to amend the articles of association and enter into the shareholders' agreements. Second, the company sent proposals to the municipalities, which were submitted to the municipal authorities and approved by the municipalities through council resolutions. Thirdly, there is no prohibition against entrusting Eco.Lan with the municipal hygiene service following amendments to the articles of association to assess the technical and economic conditions for the direct entrusting of the service (Council of State, 2020e).	Legal	Rejected
<i>Appellant</i> — ASM Pavia S.p.A. <i>Defendant</i> — Pizzamiglio Andrea S.r.l <i>Against</i> — Municipality of Bereguardo	The Council of State considered judgement 5480/2020 unacceptable because an error of fact and law was made. First, it describes the erroneous perception of the material content of the trial documents, wherein the judge based his conviction on a false reality. Second, it highlights the erroneous interpretation and assessment of the facts and, more generally, of the procedural findings (Council of State, 2020f).	Legal	Unacceptable

Table B.1. Judgments of the Council of State from 2020 to 2022 (Part 4)

<i>Subjects</i>	<i>Reasons for the appeal</i>	<i>Reason</i>	<i>Result</i>
<i>Appellant</i> — Busitalia Sita Nord S.r.l. <i>Defendant</i> — Metropolitan City of Genoa <i>Against</i> — Azienda Mobilità e Trasporti S.p.A.	The Council of State rejected judgment 4310/2020 for the following reasons. First, there is no evidence that the in-house award was nevertheless adopted for the sole purpose of avoiding the reduction of state transfers. Second, there are no reasons to argue that the Metropolitan City of Genoa should have compared in-house statistics with the market to achieve the objectives of cost-effectiveness and quality of the local public transport service. Furthermore, there is no reason to contest the requirements of analogous control and prevalent activity concerning the in-house assignee Azienda Mobilità e Trasporti due to the role of the main partner of the Municipality of Genoa with an absolute majority shareholding in the share capital of the direct awardee (Council of State, 2020g).	Efficiency Quality Effectiveness Legal	Rejected
<i>Appellant</i> — Centro Servizi Ambientali S.r.l. <i>Defendant</i> — Lazio Region - Municipality of Sant'Ambrogio Sul Garigliano	The Council of State rejected judgment 3895/2020 for two reasons. First, there was a lack of evidence on the legitimacy of the direct award by the municipality to SAF of the waste treatment service as it is allowed under the EU law and jurisprudence. Second, there is no evidence supporting the argument that the municipality of Sant'Ambrogio could not deliver its waste to the Colfelice plant located in the same Optimal Territorial Ambit only because the distance of the Castelforte plant is approximately 17 km less than the place of collection (Council of State, 2020h).	Social Legal	Rejected
<i>Appellant</i> — Modefin S.r.l. <i>Defendant</i> — Municipality of Padua <i>Against</i> — APS Holding S.p.A.	The Council of State ruled judgement 2126/2020 to be unacceptable for various reasons. First, the request had to be based on data explaining the gravity of the situation. Second, there is no basis for the adhesive intervention to be considered as 'autonomous', having rejected the plea of lack of jurisdiction raised by Modefin in the first round of its appeal. Third, the action was brought late. Fourth, there is no explanation as to why the company decided to bring the action before the administrative court to request a declaration of lack of jurisdiction in favour of the ordinary courts (Council of State, 2020i).	Legal	Unacceptable
<i>Appellant</i> — Arca Servizi S.r.l. <i>Defendant</i> — Municipality of Padua <i>Against</i> — APS Holding S.p.A.	The Council of State accepted judgment 2126/2020 for two reasons. First, there is a lack of interest on the part of the winning company, which has no advantage from the possible acceptance of the appeal. Second, the harmfulness of the extension ordered by the contested measure was included only during the closing statement, which could have been challenged previously (Council of State, 2020i).	Quality Effectiveness Sociality Legal	Accepted
<i>Appellant</i> — Face S.p.A. <i>Defendant</i> — Municipality of Forlimpopoli	The Council of State rejected judgement 1564/2020 because there is no obligation for the municipality of Forlimpopoli to award the contract using a public evidence procedure. Furthermore, the municipality's choice creates a 'minor' benefit by highlighting the transition between two forms of direct management (Council of State, 2020a).	Sociality Quality	Rejected
<i>Appellant</i> — Various <i>Defendant</i> — ASL Foggia <i>Against</i> — Sanitaservice Asl Fg S.r.l.	The Council of State rejected judgment 410/2020 based on two reasons. First, the application for appeal was filed after 30 days, the maximum limit provided for by law. Second, there were no significant elements to establish non-admissibility (Council of State, 2020j)	Legal	Rejected

APPENDIX C. A FACSIMILE FOR ASSESSMENT OF IN-HOUSE AWARD OF CONCESSION CONTRACTS

INTRODUCTION

This section describes the main characteristics of the administrative officer, in-house company and concession contracts.

Summary information

In-house award of concession contract	
Authority	
Contract time	
Economic value	
Work, services or supply location	

Administrative officer

First name, last name	
Department	
Phone, email	
Date	--/------

In-house company

Corporate purpose	
Historical evolution	
Activities and work, services or supplies provided	
Other information	

CONCESSION CONTRACT BACKGROUND

This section includes a concession contract background.

The choice between the competitive award and direct award depends on the following factors:

- environmental context (uncertainty and variability);
- market conditions;
- in-house award of concession contract characteristics:
 - work, services or supply and all its components;
 - work, services or supply technical standards;
 - work, services or supply qualitative standards;
 - work, services or supply quantitative standards;
- relationship between the awarder and awardee;
- in-house award of concession contract characteristics timing;
- information accessibility;
- monitoring and control conditions;
- contractual clauses.

1. LEGISLATION SECTION

This section includes the legislation related to the in-house award of a concession contract; it highlights:

- European regulation;
- national legislation;
- regional legislation;
- other key legislation.

2. ECONOMIC SECTION

This section includes an economic fairness assessment. It presents the determination of the basic calculation for evaluating the fairness of the economic offer for the activities available on the market under a competitive regime and the benchmark analysis with companies that produce the same services.

The determination of the calculation basis favours the assessment of the economic adequacy of the activities available on the market under a competitive regime that the authorities entrust under the legislation.

The legislation, the company’s statute and other corporate documents, including analytical accounting, determine the calculation. For example, analytical accounting allows for the timely allocation of costs to projects and activities. The direct costs of the activities are immediately charged to the order.

The determination of the calculation starts from the determination of the parameters useful for the comparison and analysis of the financial statements from at least the last three years and the national collective labour agreement. For example, the parameters useful for the calculation basis can be the following:

Year	No. employee	No. hours	Days productive	Employee cost	Employee cost per hour	Structural cost	Internal cost	Internal cost per hour	Service cost	Value of production	% EBITDA
2021											
2020											
2019											
Average											

The number of hours corresponds to the total annual working hours of the company's employees. The type of employment contract and the number of employees referring to that specific type of contract calculates the total number of hours per year. Presented below is the calculation of the annual hours for the full-time worker:

No. days per year		-
No. Saturday and Sunday per year		=
Total gross days		-
No. days of holidays and permits		=
Total net days		x
No hours/day		=
Total hours per year for full-time worker		

Personnel costs correspond to the wages and all company benefits awarded to employees (item B.9 of the Income Statement). The gross hourly employee cost is calculated by dividing the employee cost by the number of annual working hours, while the labour cost per capita is calculated by dividing the employee cost by the number of employees. Internal costs represent the sum of personnel and structural costs, which are costs that do not vary as production varies. The structural costs are calculated as follows:

B.6 For raw materials, ancillaries, consumables and goods	+
B.8 For use of third-party assets	+
B.10 Depreciation and write-downs	+
B.11 Changes in inventories of raw materials, supplies, consumables and goods	+
B.12 Provisions for risks	+
B.13 Other provisions	+
B.14 Miscellaneous management charges	=
Total structural costs	

The gross activity cost per hour is the amount of expenses incurred by the company for each working hour. Costs for services are those certain or estimated costs deriving from the buying of services in the exercise of the company's ordinary activity.

The earnings before interests taxes depreciation and amortization (EBITDA) is a profitability indicator that highlights a company's income based only on its operational management without considering financial management, tax management, depreciation of assets and depreciation. The calculation of EBITDA% is calculated as follows.

A. Production value	-
B.6 Costs of raw materials	-
B.7 Costs of services	-
B.8 Third-party assets	-
B.9 Personnel costs	-
B.12 Provisions for risks	-
B.14 Other management charges	/
Value of production	=
% EBITDA	

This indicator is suitable for comparing the results of different companies operating in the same sector. EBITDA is also used instead of operating income, as it is not tied to particular budgetary policies, such as the depreciation policy (Ferrero et al., 2003).

Benchmark analysis compares the work or service performance of an in-house organization with its competitors; Benchmark analysis creates a comparison between the activity under study and a certain number of other companies with similar characteristics through the use of specific metrics useful for comparison. Benchmark analysis is used to compare performance with potential competitors over a given period. The performances to consider are those indicated previously. The benchmark analysis compares a series of information such as the gross cost of personnel per hour, the cost of labour per capita and the internal cost per hour to assess the economic adequacy of in-house award of concession contracts.

3. SOCIAL SECTION

This section introduces the main benefits for the community. According to national legislation, it highlights the results obtained regarding the universality and sociality, efficiency, cost-effectiveness and quality of the service provided, as well as the optimal use of public resources.

Below, it highlights an example of a measurement system for the assessment of social benefits.

<i>Perspectives and objectives</i>	<i>KPI</i>	<i>Result</i>	<i>Target</i>
<i>Effectiveness</i>			
Objectives of the in-house award of concession contracts			
<i>Universality and sociality</i>			
Equality of behaviour towards users in the area			
Impartiality in terms of physical and economic accessibility			
Continuity in the provision of services			
Guarantee of employment stability			
Increase in the number of service users or interconnected system			
<i>Efficiency</i>			
Comparison between available resources and expected results			
Use of efficiency strategies			
<i>Quality</i>			
Quality of implementation			
Quality of timing			
Quality of delivery			
Evaluation of the quality delivered through customer satisfaction			
Evaluation of citizen participation			

CONCLUSION

This section highlights award explanation.