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PUBLIC PROCUREMENT

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EUROPEAN COMMISSION
Directorate General Internal Market and Services

PUBLIC PROCUREMENT POLICY

EXPLANATORY NOTE – COMPETITIVE DIALOGUE – CLASSIC DIRECTIVE[1]

1. Introduction

In response to the finding that the "old" Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication of a contract note is limited solely to the cases exhaustively listed in those Directives, a new award procedure, the competitive dialogue, was introduced in the new Directive 2004/18/EC[2] (hereinafter referred to as the "Directive" or the "Classic Directive").

As set out in recital 31, the legislation has therefore set itself the objective of providing for "a flexible procedure ... which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate." However, it should be noted that the competitive dialogue is a procedure which can only be used in the specific circumstances expressly provided for in Article 29.[3]

2. Field of application - Under what circumstances can the competitive dialogue be used?

2.1. Complexity and objective impossibility

The first condition is that the market in question should be **"particularly complex"**. The second paragraph of Article 1(11)(c) envisages two types of markets that are regarded as being particularly complex, specifically "where the contracting authorities:

– are not objectively able to define the technical means .... capable of satisfying their needs or objectives and/or

– are not objectively able to specify the legal and/or financial make-up of a project."

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1 This document corresponds to document CC/2005/04_rev 1 of 5.10.2005

2 Use of the negotiated procedures with opening to competition is not limited, either in the new Utilities Directive, Directive 2004/17/EC, or in the "old" Utilities Directive, Directive 93/38/EEC. Consequently, the competitive dialogue has not been introduced in the new Utilities Directive. However, there is nothing to prevent a contracting authority which has opted for a negotiated procedure with prior opening to competition from stipulating in the specifications that the procedure will be as laid down by the Standard Directive regarding the competitive dialogue.

3 Cf. the second sentence of the second subparagraph of Article 28.

These provisions should be read in the light of the first part of recital 31: "Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance."

In view of the fact that this is a special procedure whose use is regulated, it is necessary to examine on a case by case basis the nature of the market in question, taking account of the capacity **of the contracting authority** concerned to verify whether use of the competitive dialogue would be justified. This is because the concept of objective impossibility is not an abstract concept; it is mitigated by the preciseness of the recital under which the contracting authorities concerned find themselves in this situation "***without this being due to any fault on their part***". In other words, the contracting authority has an obligation of diligence – if it is in a position to define the technical resources necessary or establish the legal and financial framework, the use of the competitive dialogue is not possible.

It should be noted that amendments had been proposed during the legislative procedure aimed at limiting the use of competitive dialogue solely to cases where the prior organisation of a contest or the prior conclusion of a contract for the procurement of services (the completion of a study) would not have permitted the contracting authority to conclude the main contract (relating to the construction of a particularly complex project) through the use of an open or restricted procedure. This obligation has not been adopted by the legislation. The reason for this is that imposing it could present problems in certain cases, either as a result of the time required to conduct two award procedures and for the execution of the first contract or because of the risk that the first procedure could prove unproductive or the competition for the main contract would be insufficient if the service provider, the subject of the first contract, were to be excluded from participation in the second one in order to observe the principal of equality of treatment and/or the rule concerning the technical dialogue (recital 8).

2.2. Technical complexity

According to the wording of recital 31, technical complexity exists where the contracting authority is not able to define the means of satisfying its needs and/or able to achieve its objectives. Two cases may arise: either that the contracting authority would not be able to define the technical means to be used in order to achieve the prescribed solution; this should be fairly rare given the possibilities of establishing technical specifications – totally or partially - in terms of functionality or performance;[4] or – which would occur more often – that the contracting authority would not be able to determine which of several possible solutions would be best suited to satisfying its needs. In both cases, the contract in question would have to be considered as being particularly complex.

Let us take the example of a contracting authority wanting to create a connection between the shores of a river – it might well be that the contracting authority cannot determine whether the best solution would be a bridge or a tunnel, even though it would

4 I.e. through the use of one of the methods laid down in Article 23(3)(b), (c) and (d).

be able to establish the specifications for the bridge (suspended, metal, in pre-stressed concrete, etc.) or the tunnel (with one or more tubes, to be constructed under or on the riverbed, etc.). In this case, use of a competitive dialogue would also be justified.

As recalled by recital 31 – and to the extent they are not configured as concessions contracts – technical complexity could be present in the case of certain projects relating to the construction of major integrated transport infrastructure projects or the construction of major computer networks (although such cases are also likely to present legal or financial complexities).

2.3. Legal or financial complexity

Recital 31 states that a financial or legal complexity "may arise in particular … with the implementation of … projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance." Obviously, such issues arise very, very often in connection with projects of Public Private Partnerships.[5]

One possible example of legal or financial complexity might be a situation in which the contracting authorities cannot foresee whether the economic operators will be prepared to accept such an economic risk that the contract will be a concession contract or whether ultimately it will end up being a "traditional" public contract.[6] In this situation a contracting authority considering it most likely that the contract will be a concession and consequently applying a procedure other than as laid down for public contracts[7] would find itself faced with difficult choices if it were to turn out at the end of the procedure that the contract would after all be a public contract and not a concessions contract. This is because the contracting authority could either conclude the contract and commit an infringement of Community law, with all the resultant risks of appeals or infringement proceedings, or cancel the procedure and restart it using one of the procedures laid down for concluding public contracts. In such cases, the competitive dialogue allows these problems to be avoided: this is because the procedural requirements would be satisfied whether the contract results in a public contract or a concessions contract.

Another example of legal or financial complexity which could justify the use of the competitive dialogue (yet again concerning a form of private financing, or even a public-private partnership) can be found in the Commission's administrative practice: the contracting authority planned to rebuild a school and wanted to limit the costs of this as much as possible by allowing the economic operators to propose different ways of remuneration by using land belonging to the contracting authority for various purposes

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5 There is, however, no automaticity - calling something a "PPP-project" does not in itself entail legal or financial complexity; it must always be examined whether the concrete case meets the conditions or not even though that will most often be the case.

6 Of course, if the contracting authority is able to anticipate that the contract will definitively take the form of a concession of services – and this proves to be the case – it is not obliged to apply the provisions of the Directive (including those relating to the competitive dialogue) and can use a procedure which satisfies the requirements arising out of the Treaty (cf. footnote 6).

7 Depending on the case, either the procedure laid down by concessions of works or a procedure complying with the requirements arising out of the Treaty, as interpreted by the Telaustria case-law.

(housing construction, sports facilities, etc.), together with payment or not.[8] In the case in question this was a works contract and not a concession. Other examples of projects that most often justify recourse to the competitive dialogue could be projects in which the contracting authorities wish to have at their disposal a facility (school, hospital, prison, etc.) to be financed, built and operated by an economic operator (i.e. the latter would take care of maintenance works, maintenance services, guard services, catering services, etc.), often for a fairly long period. The legal and financial set-up is very often particularly complex and it may furthermore be uncertain from the outset whether the end result will be a concession or a public contract.

3. Conduct of the procedure

3.1. Contract notice, descriptive document and selection of economic operators

The contracting authority makes known its "needs and requirements" in the contract notice and it defines them in the notice itself and/or in a descriptive document.[9] The substantial or fundamental elements of the notice and of the descriptive document may not be modified during the award procedure.[10]

As the selection is carried out "in accordance with the relevant provisions of Articles 44 to 52",[11] the notice will have to state the minimum capacity levels. Where the competitive dialogue is justified by technical complexity, the contracting authorities can establish their requirements concerning the technical capacity of the economic operators on the basis of the definition of needs and requirements. If, for example, the contract relates to the establishment of an integrated transport infrastructure intended to serve a geographic area of size x with a transport capacity of y persons/hour without specifying a precise combination of the various means of transport, the candidates will have to prove their capacity to build such transport systems whatever the combination of means of transport they use for this purpose.

If the contracting authorities intend to limit the number of participants to be invited to the dialogue (at least three), the notice will also have to contain "the objective and non-

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8 In the case in question, the contracting authority used a negotiated procedure with the publication of a contract notice, invoking an exemption from Directive 93/37/EEC corresponding to that laid down in Article 30(1)(b) of the Standard Directive ("*in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing*"). However, this derogation is to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out; it does not cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.

9 The "descriptive document" is the counterpart of the traditional "specifications". The term "descriptive document" was chosen to indicate that it was a document that may be less detailed and/or more prescriptive than "normal" specifications. It should be emphasised that the descriptive document may, for example, envisage legal/administrative/contractual conditions which will form part of the common basis for the conduct of the procedure and the preparation of tenders.

10 See the end of the second subparagraph of Article 29(6) and the end of the second sentence of Article 29(7).

11 Article 29(3).

discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number."[12]

Where the contracting authorities intend to make use of the opportunity laid down in Article 29(4)[13] to gradually reduce the number of solutions to be discussed during the dialogue phase, they have to indicate this in the contract notice or the descriptive document.

Under Annex VII A, "contract notices"[14], point 23, first sentence, the notice should state which of the "criteria referred to in Article 53 [are] to be used for award of the contract: 'lowest price' or 'most economically advantageous tender'". In the case of the competitive dialogue, the award criterion must be the most economically advantageous tender.[15]

The criteria to be used for the identification of the most economically advantageous tender[16] should appear in the contract notice if they do not appear in the descriptive

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12 Article 44(2) and (3). Article 44(3) envisages the invitation of at least three candidates, "provided a sufficient number of suitable candidates is available." It is specified in the third subparagraph of this paragraph that "Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities."

13 See section 3.2.1 below. This possibility may be used either instead of the limitation of the number of participants to invite at the beginning of the dialogue (see the paragraph below) or on top of the initial limitation.

14 The contract notice contains information that may give rise to questions in the context of a competitive dialogue. Thus, point 6(b), first indent, requires contracting authorities to indicate whether tenders are "requested with a view to purchase, lease rental, hire or hire purchase or a combination of these". In the case of a competitive dialogue, contracting authorities may often not know which of these forms of contracts will be appropriate - they will therefore have to indicate that tenders may take any of these forms, at the tenderer's choice. Under point 9 of the notice, contracting authorities must indicate whether variants are admitted or not. Variants are useful only as "alternatives" to a "standard" solution / "standard" requirements – given that "standard" solutions will rarely be prescribed in the context of a competitive dialogue, the need to have recourse to variants will doubtlessly be very limited. If, however, contracting authorities find that they need to provide for the possibility of deviating from certain requirements which would otherwise be applicable, then they must not only indicate in the notice that variants are allowed, but also – and above all – indicate (in the descriptive document) what "the minimum requirements to be met by the variants and any specific requirements for their presentation" (Art. 24(3)) are. Deviations from substantial or even fundamental prescriptions during the award procedure are not possible unless explicit provision is made for such a possibility right from the beginning of the procedure. Similarly, any division into lots and the possibility of tendering for one, more or all of the lots must be mentioned in the notice as the introduction of such possibilities during the procedure would constitute a fundamental change to the award procedure. The contracting authority might also wish to have the right to draw on options – for instance, in the case of a contract to create a transport system in a given zone, the possibility of extending the system to a greater area. In this case, too, contracting authorities must indicate this possibility in the contract notice – otherwise, such options will not be possible.

15 See the second subparagraph of Article 29(1).

16 For example, "price, technical value, environmental characteristics …"

document.[17] The relative weighting of the criteria or, under the conditions laid down in the third subparagraph of Article 53(2), the decreasing order of importance of the criteria should appear in the contract notice, the descriptive document or the invitation to participate in the dialogue.[18] In respect of weighting, the Directive provides that "where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance." This provision should be applied in the light of the explanations provided in the second subparagraph at the end of recital 46: "Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. …" Given that recourse to competitive dialogue presupposes that the contract is "particularly complex", it seems almost tautological that the conditions for not weighting the award criteria should therefore be met when the contract is awarded by this award procedure – contracting authorities may instead limit themselves to mentioning the criteria in decreasing order of importance.

It should be stressed that the award criteria (and the order of their importance) may not be changed during the award procedure (that is, at the latest after the transmission of the invitations to participate in the dialogue) for obvious reasons of equal treatment; in fact, any changes to the award criteria after this stage in the procedure would be introduced at a time when the contracting authority could have obtained knowledge of the solutions that are proposed by the different participants. The possibilities of "steering" the procedure in favour of one or the other participants would be all too obvious, and even more so in those cases where these same award criteria were used to gradually reduce the number of solutions to be examined (see point 3.2.1 below and, in respect of the criteria themselves, footnote 16 above).

After the expiry of the time for submission of applications to participate[19] and after having made their selection, the contracting authorities send an invitation to participate in the dialogue to the candidates selected. This invitation must be in accordance with the provisions of Article 40.

3.2. The dialogue stage

Under Article 29(3), "contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may

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17 See Annex VII A, "contract notices", section 23, second sentence. As with selection criteria, the award criteria may be established in terms of the needs and requirements of the contracting authority. Thus, in the example referred to above of an integrated transport infrastructure, the award criteria could be the cost of establishment and management for the contracting authority, the environmental impact of the system, the level of comfort offered, the frequency of service, the transport capacity of the system, accessibility to the system for handicapped persons, the safety of the system, etc., i.e., criteria that may be applied whatever the technical solution proposed. Of course, these criteria and the manner in which they are applied will have to be specified in the contract documents.

18 See Article 53(2) and Article 40(5)(e).

19 To be established in accordance with the provisions of Article 38.

discuss all aspects of the contract with the chosen candidates during this dialogue." This latter provision should be underlined: the dialogue may therefore relate not only to "technical" aspects, but also to economic aspects (prices, costs, revenues, etc.) or legal aspects (distribution and limitation of risks, guarantees, possible creation of special purpose vehicles, etc.).

The Directive does not regulate the conduct of the dialogue in detail; it limits itself to placing it within the framework of the provisions of the second and third subparagraphs of Article 29(3).[20] Under this latter provision, the starting point is that the dialogue should be carried out individually with each of the participants on the basis of the ideas and solutions of the economic operator concerned. Except with the consent of the parties concerned,[21] there is therefore no danger of "cherry-picking" – i.e. the use of the ideas and solutions of one of the participants by another one – and confidentiality is further protected by a general provision on the subject, Article 6.[22] Moreover, participants may also, as appropriate, benefit from the protection laid down by – Community or national – legislation on intangible property. It should therefore be noted that the competitive dialogue is the only award procedure laid down by the Directive providing protection for ideas not subject to intangible property rights – in particular, no provision comparable to that in the third subparagraph of Article 29(3) exists for the negotiated procedure.[23]

During the course of the dialogue, contracting authorities may ask the participants to specify their proposals in writing, possibly in the form of progressively completed/refined tenders, as implicitly assumed in Article 29(5).[24] Aware of the fact that this may require considerable investment for the economic operators concerned, the Community legislation wished to indicate that it may be particularly appropriate in the

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20 "During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement."

21 It would be possible for contracting authorities to stipulate in the tender notice or in the descriptive document that acceptance of the invitation to participate implies consent.

22 "Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders."

23 The Commission has had to deal with cases concerning negotiated procedures – with or without publication – used in situations where a competitive dialogue could have been justified. Despite the absence of any provision aimed at prohibiting it, it should be noted that none of them related to "cherry-picking" situations, etc.

24 "The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs."

case of the competitive dialogue to specify "prices[25] or payments to the participants in the dialogue".[26]

3.2.1. Gradual limitation of the number of solutions to be examined

Under Article 29(4), contracting authorities may "provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria[27] …". The very complexity of the contract, coupled with the necessity for the contracting authorities of comparing several solutions and being able to take decisions which can subsequently be justified, requires that the application of the award criterion be based on written documents. Whether these documents are qualified as “outline solutions”, “project proposals”, “tenders” or other is not specified in the Directive – it is in any case clear that even if considered to be “tenders”, they cannot be required to contain “all the elements required and necessary for the performance of the project” given that this requirement only applies to tenders that are submitted in the final stage of the competitive dialogue (cf. Article 29(6)).[28] It should be noted that it is the number of solutions to be discussed which is directly referred to by gradual reduction.[29] However, the reduction in the number of solutions must remain within the limits laid down in the last sentence of Article 44(4): "In the final stage[30], the number arrived at shall make for genuine competition …”. The Directive specifies that this rule only applies “insofar as there are enough solutions or suitable candidates." Reduction by application of the award criteria might therefore show that there is only one

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25 In this context the term "price" should be understood in the meaning of "prize" or "award", i.e. as being directly based on the provision in Article 67(2)(b) on design contests.

26 See Article 29(8). Strictly speaking, this provision would be unnecessary, since such prices or payments could be provided for even in the absence of such a provision, as there is nothing in the Directive to prevent them. If the provision nevertheless appears in the finally adopted Directive, it is only as a "signal " and it should be emphasised that conclusions to the contrary should not be drawn concerning the possibility of such prices or payments in relation to award procedures other than the competitive dialogue. See in this sense the second subparagraph of Article 9(1), which is not limited solely to the competitive dialogue ("Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.").

27 See the fourth subparagraph of point 3.1 above.

28 As is the case with the final tender, the Directive does not establish precise time limits for the submission of tenders within the framework of a competitive dialogue. Such time limits must however be established in compliance with Article 38(1) ("When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders") and the principle of equality of treatment.

29 In the majority of cases, participants will only have developed one solution each and the elimination of the solution therefore also entails the elimination of the economic operator concerned. However, there is nothing in the Directive to prevent the contracting authorities from allowing the participants to develop several solutions.

30 In the context of the competitive dialogue, this relates to the final tenders laid down in Article 29(6).

appropriate candidate or solution, which does not prevent the contracting authorities from continuing with the procedure.[31]

3.3. End of the dialogue, final tenders and award of the contract

At the appropriate time, the awarding authority declares the dialogue concluded and informs the participants of this.[32] It asks them to submit their "final tenders on the basis of the solution or solutions presented and specified during the dialogue." Generally speaking, these final tenders are based on the solution (or possibly solutions) of each of their participants – it is only in the scenario of an agreement referred to in the third subparagraph of Article 29(3) on the part of the economic operator or operators concerned that the contracting authority could ask the participants to base their final tender on a solution common to all. Normally, there is not therefore a new set of specifications or descriptive document at the end of the dialogue. The Directive provides that "these tenders shall contain all the elements required and necessary for the performance of the project" – they are therefore complete tenders.

Once these final tenders have been received, the contracting authority may, under the second subparagraph of Article 29(6), ask for them to be to be "clarified, specified and fine-tuned ... However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect." The wording of this provision – like that of the second subparagraph of paragraph 7 – was based largely on a statement by the Council:[33] "*The Council and the Commission state that in open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.*" In the light of the precise wording of the last sentence of recital 31,[34] it may therefore be considered that the room for manoeuvre that contracting authorities have after the submission of the final tenders is fairly limited.

Under the first subparagraph of Article 29(7), the final tenders are then assessed on the basis of the award criteria and the most economically advantageous tender is identified. Where necessary and at the request of the contracting authority, the tenderer identified as

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31 Obviously, the provisions of Article 41 concerning justification of the various decisions taken during an award procedure are also applicable in this context.

32 See the first subparagraph of Article 29(6).

33 Published in OJ L 210 of 21.7.1989, p. 22. This statement accompanied Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts. The statement relates to Article 5(4) of Directive 71/305/EEC.

34 "However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous."

having submitted the most economically advantageous tender "may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination." It must be emphasised that this does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the Community legislative process. It relates to something much more limited, specifically "clarification" or "confirmation"[35] of undertakings already appearing in the final tender itself. This provision should also be interpreted in the light of the last sentence of recital 31, as cited in footnote 33.

In conclusion, the competitive dialogue may be summarised, by way of simplification, as a particular procedure which has features in common with both the restricted procedure and the negotiated procedure with the publication of a contract notice. The dialogue mainly distinguishes itself from the restricted procedure by the fact that negotiations concerning every aspect of the contract are authorised and from the negotiated procedure by the fact that, essentially, negotiations are concentrated within a particular phase in the procedure.

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35 This possibility of confirming undertakings at the very last stage before the conclusion of the contract but after the identification of the most economically advantageous tender has been provided in particular in order to take account of the reluctance of financial institutions to subscribe to firm undertakings before this stage of a procedure.

COMMISSION INTERPRETATIVE COMMUNICATION ON CONCESSIONS UNDER COMMUNITY LAW

(2000/C 121/02)

On 24 February 1999 the Commission adopted and published a Draft Commission interpretative communication on concessions under Community law on public contracts [1] and submitted it to a wide range of bodies for consultation. Taking into account the substantial input [2] it has received following publication of the initial draft in the *Official Journal of the European Communities*, the Commission has adopted this interpretative communication.

1. INTRODUCTION

1. Concessions have long been used in certain Member States, particularly to carry out and finance major infrastructure projects such as railways and large parts of the road network. Involvement of the private sector has declined since the first quarter of the 20th century as governments began to prefer to be directy involved in the provision and management of infrastructure and public services.

2. However due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, interest in concessions has been heightened over the last few years.

3. First of all, it should be pointed out that the Community does not give preference to any particular way of organising property, whether public or private: Article 295 (ex Article 222) of the Treaty guarantees neutrality with regard to whether enterprises are public or private.

4. Given that this form of association with operators is being used more and more frequently, particularly for major infrastructure projects and certain services, the Commission feels this interpretative communication is needed to keep the operators concerned and the public authorities informed of the provisions it considers apply to concessions under current Community law. Indeed, the Commission is repeatedly faced with complaints concerning infringements of Community law on concessions when public authorities have called on economic operators' know-how and capital to carry out complex operations. It has thus decided to define the concept of 'concessions' and set out the guidelines it has followed up to now when investigating cases. This interpretative communication is therefore part of the transparency required to clarify the current legal framework in the light of the experience gained when investigating the cases examined up to now.

5. In the draft version of this interpretative communication [3], the Commission had stated that it also intended to deal with the other forms of partnership used to call upon private-sector financing and know-how. The Commission decided not to consider the forms of partnership whose characteristics are different from those of a concession as defined in this interpretative communication. Such an approach was also favoured in the input received. The wide range of situations, which are in constant flux, as revealed in the feedback on the draft interpretative communication, calls for an indepth consideraton of the characteristics they have in common. The discussion set off by the publication of the draft interpretative communication must therefore continue on this matter.

6. The comments on concessions have enabled the Commission to refine its analysis and define the characteristics of concessions which distinguish them from public contracts, in particular the delegation of services of general interest operated by this kind of partnership.

7. The Commission wishes to reiterate that this text does not seek to interpret the specific regimes deriving from Directives adopted in different sectors, such as energy and transport.

This interpretative communication (hereinafter referred to as the 'communication') will specify the rules and the principles of the Treaty governing all forms of concession and the specific rules that Directive 93/37/EEC on public works contracts [4] (hereinafter 'the works Directive') lays down for public works concessions.

2. DEFINITION AND GENERAL PROBLEM OF CONCESSIONS

Concessions are not defined in the Treaty. The only definition to be found in secondary Community law is in the works Directive, which lays down specific provisions for works concessions [5]. However, other forms of concessions do not fall within the scope of the directives on public contracts [6].

However, this does not mean that concessions are not subject to the rules and principles of the Treaty. Indeed, insofar as these concessions result from acts of State, the purpose of which is to provide economic activities or the supply of goods, they are subject to the relevant provisions of the Treaty and to the principles which derive from Court Case law.

In order to delimit the scope of this communication, and before specifying which regime applies to concessions, their distinctive features must be described. To this end, a brief review of the concept of works concessions as found in the works Directive should prove useful.

2.1. WORKS CONCESSIONS

2.1.1. **Definition as given in Directive 93/37/EEC**

The Community legislator has chosen to base its definition of works concessions on that of public works contracts.

The text of the works Directive states that public works contracts are 'contracts for pecuniary interest concluded in writing between a contractor and a contracting authority (. . .) which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work (. . .), or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority' (Article 1(a)).

Article 1(d) of the same Directive defines a public works concession as 'a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

According to this definition, the main distinctive feature of a works concession is that a right to exploit a construction is granted as a consideration for having erected it; this right may also be accompanied by payment.

2.1.2. **Distinction between the concepts of 'public works contract' and 'works concession'**

The Commission believes that the right of exploitation is a criterion that reveals several characteristics which distinguish a works concession from a public works contract.

For example, the right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The period for which the concession is granted is therefore an important part of the remuneration of the concessionnaire. The latter does not receive remuneration directly from the awarding authority, but acquires from it the right to obtain income from the use of the structures built ([7]).

The right of exploitation also implies the transfer of the responsibilities of operation. These responsibilities cover the technical, financial and managerial matters relating to the construction. For example, it is the concessionaire who is responsible for making the investments required so that it may be both available and useful to users. He is also responsible for paying off the construction. Moreover, the concessionaire bears not only the usual risks inherent in any construction — he also bears much of the risk inherent in the management and use of the facilities ([8]).

From these considerations, it follows that, in works concessions, the risks inherent in exploitation are transferred to the concessionaire ([9]).

The Commisison notes that more and more public works contracts are the subject of complex legal arrangements ([10]). As a result, the boundary between these arrangements and public works concessions can sometimes be difficult to define.

In the Commission's view, the arrangement is a public works contract as understood under Community law if the cost of the construction is essentially borne by the awarding authority and the contractor does not receive remuneration from fees paid directy by those using the construction.

The fact that the Directive allows for a payment in addition to the right of exploitation does not change this analysis. Such situations have occurred. The State therefore bears part of the costs of operating the concession in order to keep prices down for the user (providing 'social prices' ([11])). A variety of procedures are possible (guaranteed flat rate, fixed sum but paid on the basis of the number of users, etc.). These do not necessarily change the nature of the contract if the sum paid covers only a part of the cost of the construction and of operating it.

The definition of a concession allows the State to make a payment in return for work carried out, provided that that this does not eliminate a significant element of the risk inherent in exploitation. By specifying that there may be payment in addition to the right to exploit the construction, the works Directive states that operation of the structure must be the source of the concessionaire's revenue.

Even though the origin of the resources — directly paid by the user of the construction — is, in most cases, a significant factor, it is the existence of exploitation risk, involved in the investment made or the capital invested, which is the determining factor, particularly when the awarding authority has paid a sum of money.

However, even within public works contracts, part of the risk may be borne by the contractor ([12]). However, the duration of concessions makes these risks more likely to occur, and makes them relatively greater.

On the other hand, risks arising from the operation's financial arrangements, which could be considered 'economic risks', are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction ([13]) and is is significant factor distinguishing concessions from public works contracts.

In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question.

If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions ([14]).

2.2. SERVICE CONCESSIONS

Article 1 of Directive 92/50/EEC on public service contract (hereinafter referred to as the 'services Directive') states that this Directive applies to 'public services contracts', defined as 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of (. . .)'.

Unlike the works Directive, the services Directive does not define 'service concessions' ([15]).

With the sole intention of distinguishing service concessions from public services contracts, and therefore limit the scope of the Communication, it is important to describe the essential characteristics of concessions.

For this purpose, it would seem useful to work on the basis of factors deriving from the above-mentioned concept of works concessions which take into account the Court's case law on the subject ([16]) and the *opinio juris* ([17]).

Works concessions are assumed to serve a different purpose from service concessions. This may lead to possible differences in terms of investment and duration between the two types of concessions. However, given the above criteria, the characteristics of concession contracts are generally the same, regardless of their subject.

Thus, as with works concessions, the exploitation criterion is vital for determining whether a service concession exists ([18]). Application of this criterion means that there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form. As is the case for works concessions, the way in which the operator is remunerated is a factor which helps to determine who bears the exploitation risk.

Similarly, service concessions are also characterised by a transfer of the responsibility of exploitation.

Lastly, service concessions normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights ([19]).

It should also be pointed out that, in the Lottomatica judgment mentioned above, the Court clearly distinguished between a transfer of responsibility to the concessionaire as concerns operating a lottery, which may be considered to be a responsibility of the State as described above, and simply supplying computer systems to the administration. In that case it concluded that without such a transfer the arrangement was a public contract.

2.3. DISTINCTION BETWEEN WORKS CONCESSIONS AND SERVICE CONCESSIONS

Given that only Directive 93/37/EEC provides for a special system of procedures for granting public works concessions, it is worth determining exactly what this type of concession is, especially if it is a mixed contract which also includes a service element. This is virtually always the case in practice, since public works concessionaires often provide services to users on the basis of the structure they have built.

As for delimiting the scope of the provisions in the works and services Directives, recital 16 of the latter specifies that if the works are incidental rather than the object of the contract they do not justify treating the contract as a public works contract. In the Gestión Hotelera Internacional case the Court of Justice interpreted these provisions and stated that 'where the works [. .] are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterised as a public works contract' ([20]). The problem of mixed contracts was also addressed by the Court of Justice in another case ([21]) which determined that, when a contract includes two elements which may be separated (e.g. supplies and services), the rules which apply to each should be applied separately.

Although these principles have been established for public contracts, the Commission considers that a similar approach should be taken to determine whether or not a concession is subject to the works Directive. Its field of application *ratione materiae* is effectively the same in the case of both works contracts and works concessions ([22]).

In view of this, the Commission maintains that the first thing to determine is whether the building of structures and carrying out of work on behalf of the grantor constitute the main subject matter of the contract, or whether the work and building are merely incidental to the main subject matter of the contract.

If the contract is principally concerned with the building of a structure on behalf of the grantor, the Commission holds that it should be considered to be a works concession.

In this case, the rules laid down by the works Directive must be complied with, as long as the Directive's applicaton threshold is reached (EUR 5 000 000), even if some of the aspects are service-related. The fact that the works are performed or the structures are built by third parties does not change the nature of the basis contract. The subject matter of the contract is identical.

In contrast, a concession contract in which the construction work is incidental or which only involves operating an existing structure is regarded as a service concession.

Moreover, in practice, operations may be encountered which include building a structure or carrying out works at the same time as the provision of services. Thus, alongside a public works concession, service concessions may be concluded for complementary activities which are, however, independent of the exploitation of the concession of the structure. For example, motorway catering services may be the subject of a different service concession from that involving its construction or management. In the Commission's view, if the objects of these contracts may be separated, the rules which apply to each type should be applied respectively.

2.4. SCOPE OF THIS INTERPRETATIVE COMMUNICATION

As already stated, even though concessions are not directly addressed by the public contracts directives, they are nonetheless subject to the rules and principles of the Treaty, insofar as they are granted via acts that are attributable to the State and their object is the provision of economic activities.

Any act of State ([23]) laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the rules and principles of the Treaty, in particular Articles 43 to 55 (ex Articles 52 to 66) ([24]).

This communication therefore concerns acts attributable to the State whereby a public authority entrusts to a third party — by means of a contractual act or a unilateral act with the prior consent of the third party — the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk. Such services are convered by this communication only if they constitute economic activities within the meaning of Articles 43 to 55 (ex Articles 52 to 66) of the Treaty.

These acts of State will henceforth be referred to as 'concessions', regardless of their legal name under national law.

In view of the above, and without prejudice to any provisions of Community law which might be applicable, this communication does not concern:

— acts whereby a public authority authorises the exercice of an economic activity even if these acts would be regarded as concessions in certain Member States ([25]);

— acts concerning non-economic activities such as obligatory schooling or social security.

On the other hand, it should be noted that, when a concession expires, renewal is considered equivalent to granting a new concession, and is therefore covered by the communication.

A particular problem arises in cases where are forms of inter-organic delegation between the concessionaire and the grantor which do not fall outside the administrative sphere of the contracting authority ([26]). The question of whether and to what extent Community law applies to this kind of relationship has been addressed by the Court ([27]). However, other cases currently pending before the Court could introduce new elements in this respect ([28]).

On the other hand, relationships between public authorities and public enterprises entrusted with the operation of services of general economic interest are, in principle, covered by this communication ([29]). It is true that, according to the Court's established case law ([30]), nothing in the Treaty prevents Member States from granting exclusive rights for certain services of general interest for non-economic public interest reasons whereby those services are not subject to open competition ([31]). Nonetheless, the Court adds that the way in which such a monopoly is organised and carried out must not infringe the provisions of the Treaty on the free movement of goods and services, nor the competition rules ([32]). In addition, the way in which these exclusive rights are granted are subject to the rules of the Treaty, and may therefore be covered by this communication.

3. REGIME APPLYING TO CONCESSIONS

As mentioned above, only works concessions for an amount equal to or greater than the threshold specified in Directive 93/37/EEC (EUR 5 000 000) are subject to a specific regime.

Nonetheless, like any act of State laying down the terms governing economic activities, concessions are subject to the provisions of Articles 28 to 30 (ex Articles 30 to 36) and 43 to 55 (ex Articles 52 to 66) of the Treaty, and to the principles emerging from the Court's case law ([33]) — notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality ([34]).

The Treaty does not restrict Member States' freedom to grant concessions provided that the methods used to do so are compatible with Community law.

The Court's case law holds that, even if Member States remain free under the Treaty to lay down the substantive and procedural rules, they must respect all the relevant provisions of Community law, and particularly the prohibitions deriving from the principles enshrined in the Treaty concerning right of establishment and freedom to provide services ([35]). Moreover, the Court emphasised the importance of the principles and rules enshrined in the Tretay by specifying in particular that the public procurement directives were intended to 'facilitate the attainment within the Community of freedom of establishment and freedom to provide services' and 'to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts' ([36]).

Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public, which would be possible only on the basis of mutual trust (*intuitu personae*). According to the Treaty and the Court's established case law, the only reasons which would enable State acts which violate Articles 43 and 49 (ex Articles 52 and 59) of the Treaty to escape prohibition under these Articles are those referred to in Articles 45 and 55 (ex Articles 55 and 66). The very restrictive conditions specified by the Court for the application of these Articles are described below ([37]). There is nothing in the Treaty or in the Court's case law which implies that concessions would be treated differently.

In what follows, the Commission will refer to the rules of the Treaty and the principles deriving from Court case law that are applicable to concessions covered by this communication.

3.1. THE RULES AND PRINCIPLES SET OUT IN THE TREATY OR LAID DOWN BY THE COURT

As has already been stated above, the Treaty makes no specific mention of public contracts or concessions. Several of its provisions are nonetheless relevant, i.e. the rules instituting and guaranteeing the proper operation of the Single Market, namely:

— the rules prohibiting any discrimination on grounds of nationality (Article 12(1) (ex Article 6(1))),

— the rules on the free movement of goods (Articles 28 (ex Article 30) *et seq*.), freedom of establishment (Articles 43 (ex Article 59) *et seq*.), freedom to provide services (Articles 49 (ex Article 59) *et seq*.) and the exceptions to those rules provided for in Articles 30, 45 and 46 (ex Articles 36, 55 and 56) ([38]),

— Article 86 (ex Article 90) of the Treaty might help to determine if the granting of these rights is legitimate.

These rules and principles arrived at by the Court are clarified below.

It is true that the case law cited refers in part to public contracts. Nonetheless, the scope of the principles which emerge from it often goes beyond public contracts. They are therefore applicable to other situations, such as concessions.

3.1.1. **Equality of treatment**

According to the established case law of the Court 'the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified' ([39]).

Moreover the Court asserted that the principle of equality of treatment, of which Articles 43 (ex 52) and 49 (ex 59) of the Treaty are a particular expression, 'forbids not only overt discrimination by reason of nationality [. . .] but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result' ([40]).

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, in particular the Raulin ([41]) and Parliament/Council ([42]) judgments, 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 the measures required to ensure the exercise of this activity.

The Commission considers that it follows from this case law that the principle of open competition must be adhered to.

In the Storebaelt und Walloon Buses judgments, the Court has the occasion to set out the scope of the principle of equality of treatment in the area of public contracts, by asserting on the one hand that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers ([43]) and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors. Moreover, the Court notes that 'the procedure for comparing tenders had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency, so as to afford equality of opportunity to all tenderers when formulating their tenders' ([44]).

The Court has therefore specified in this case law concerning application of the Directives that the principle of equality of treatment between tenderers is quite separate from any possible discrimination on the basis of nationality or other criteria.

The application of this principle to concessions (which is obviously only possible when the awarding authority negotiates with several potential concessionaires) leaves the grantor free to choose the most appropriate award procedure, for example by reference to the characteristics of the sector in question, and to lay down the requirements which candidates must meet throughout the various phases of a tendering procedure ([45]). However, this implies that the choice of candidates must be made on the basis of objective criteria and the procedure must be conducted in accordance with the procedural rules and basic requirements originally set ([46]). Where these rules have not yet been set, the application of the principle of equality of treatment requires in any event that the candidates be chosen objectively.

The following should therefore be considered to contravene the above-mentioned rules of the Treaty and the principle of equality of treatment: provisions reserving public contracts only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder ([47]); practices allowing the acceptance of bids which do not meet the specifications, or which have been amended after being opened or allowing alternative solutions when this was not provided for in the initial project. In addition the nature of the initial project must not be changed during negotiation with regard to the criteria and requirements laid down at the beginning of the procedure.

Furthermore, in certain cases, the grantor may be unable to specifiy his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. In this way, each candidate knows in advance that he has the possibility of proposing various technical solutions. More generally, the specifications must not contain elements that infringe the abovementioned rules and principles of the Treaty. The requirements of the grantor may also be determined in collaboration with companies in the sector, provided that this does not restrict competition.

3.1.2. **Transparency**

The Commission points out that in its case law the Court has emphasised the connection between the principle of transparency and the principle of equality of treatment, whose useful effect it seeks to ensure in undistorted competitive conditions ([48]).

The Commission notes that in virtually all the Member States the administrative rules or practices adopted with regard to concessions provide that bodies wishing to entrust the management of an economic activity to a third party must, in order to ensure a minimum of transparency, make their intention public according to appropriate rules.

As confirmed by the Court in its most recent case law, the principle of non-discrimination on grounds of nationality, implies that there is an obligation to be transparent so that the contracting authority will be able to ensure it is adhered to ([49]).

Transparency can be ensured by any appropriate means, including advertising depending on, and to allow account to be taken of, the particularities of the relevant sector ([50]). This type of advertising generally contains the information necessary to enable potential concessionaires to decide whether they are interested in participating (e.g. selection and award criteria, etc.). This includes the subject of the concession and the nature and scope of the services expected from the concessionaire.

The Commission considers that, under these circumstances, the obligation to ensure transparency is met.

3.1.3. **Proportionality**

The principle of proportionality is recognised by the established case law of the Court as 'being part of the general principles of Community law' ([51]); it also binds national authorities in the application of Community law ([52]), even when these have a large area of discretion ([53]).

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought ([54]). In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity ([55]).

When applied to concessions, this principle, which allows contracting authorities to define the objective to be reached, especially in terms of performance and technical specifications, nonetheless requires that any measure chosen be both necessary and appropriate in relation to the objective set.

Thus, for example, when selecting candidates, a Member State may not impose technical, professional or financial conditions which are excessive and disporportionate to the subject of the concession.

The principle of proportionality also requires that competition and financial stability be reconciled; the duration of the concession must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital ([56]), whilst maintaining a risk inherent in exploitation by the concessionaire.

3.1.4. **Mutual recognition**

The principle of mutual recognition has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services.

According to this principle, a Member State must accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient Member State ([57]).

The application of this principle to concessions implies, in particular, that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided ([58]).

3.1.5. **Exceptions provided for by the Treaty**

Restrictions on the free movement of goods, the freedom of establishment and the freedom to provide services are allowed only if they are justified by one of the reasons stated in Articles 30, 45, 46 and 55 (ex Articles 36, 55, 56 and 66) of the Treaty.

With particular reference to Article 45 (ex Article 55) (which allows restrictions on the freedom of establishment and the freedom to provide services in the case of activities connected, even occasionally, with the exercise of official authority), the Court has on numerous occasions stressed ([59]) that 'since it derogates from the fundamental rule of freedom of establishment, Article 45 (ex Article 55) of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect'. Such exceptions must be restricted to those activities referred to in Articles 43 and 49 (ex Articles 52 and 59), which in themselves involve a direct and specific connection with the exercise of official authority ([60]).

Consequently, the exception included in Article 45 (ex Article 55) must apply only to cases in which the concessionairs directly and specifically exercises official authority.

This exception therefore does not automatically apply to activities carried out by virtue of an obligation or an exclusivity established by law or qualified by the national authorities as being in the public interest ([61]). It is true that any activity delegbated by the public authorities normally has a connotation of public interest, but this stil does not mean that such activity necessarily involves exercising official authority.

As an example, the Court of Justice dismisses application of the exception under Article 45 (ex Article 55) on the basis of findings such as:

— the activities transferred remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring the protection of the interests entrusted to them ([62]),

— the activities transferred were of a technical nature and therefore not connected with the exercise of official authority ([63]).

As stated above, the principle of proportionality requires that any measure restricting the exercise of the freedoms provided for in Articles 43 and 49 (ex Articles 52 and 59) should be both necessary and appropriate in the light of the objectives pursued ([64]). This implies, in particular, that in the choice of the measures for achieving the objective pursued, the Member State must give preference to those which least restrict the exercise of these freedoms ([65]).

Furthermore, with regard to the freedom to provide services, the host Member State must check that the interest to be safeguarded is not safeguarded by the rules to which the applicant is subject in the Member State where he normally pursues his activities.

3.1.6. **Protection of the rights of individuals**

In consistent case law on the fundamental freedoms guaranteed by the Treaty, the Court has stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties ([66]).

These requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights ([67]).

They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession within the meaning of the communication.

3.2. SPECIFIC PROVISION OF DIRECTIVE 93/37/EEC ON WORKS CONCESSIONS

The Commission considers it worthwhile to point out that the rules and principles explained above are applicable to works concessions. However, Directive 93/37/EEC also provides a specific system for these which includes, among other things, advertising rules.

It goes without saying that, for concessions whose value is below the threshold laid down by Directive 93/37/EEC, only the rules and principles of the Treaty are applicable.

3.2.1. **The upstream phase: choice of concessionaire**

3.2.1.1. *Rules on advertising and transparency*

Awarding authorities must publish a concession notice in the *Official Journal of the European Communities* according to the model laid down in Directive 93/37/EEC to put the contract up for competition at the European level ([68]).

A problem encountered by the Commission involves the award of concessions between public entities. Some Member States seem to consider that the provisions of Directive 93/37/EEC applicable to works concessions do not apply to contracts concluded between a public authority and a legal person governed by public law.

Nevertheless, Directive 93/37/EEC requires a preliminary advertisement for all contracts for public works concessions, irrespective of whether the potential concessionaire is private or public. Furthermore, Article 3(3) of Directive 93/37/EEC expressly states that the concessionaire can be one of the awarding authorities covered by the directive, which implies that this type of relation is subject to publication in accordance with Article 3(1) of the same directive.

3.2.1.2. *Choice of type of procedure*

As far as works concessions are concerned, the grantor is free to choose the most appropriate procedure, and in particular to begin negotiated procedures.

3.2.2. **The downstream phase: contracts awarded by the contract holder** ([69])

Directive 93/37/EEC lays down certain rules on contracts awarded by public works concessionaires for works for a value of EUR 5 000 000 or more. However, they vary according to the type of concessionaire.

If the concessionaire is an awarding authority within the meaning of the Directive, the contracts for such works must be awarded in full compliance with all the Directive's provisions on public works contracts ([70]).

If the concessionaire is not an awarding authority, the Directive stipulates that he must comply only with certain advertising rules. However, these rules are not applicable when the concessionaire awards works contracts to affiliated undertakings within the meaning of Article 3(4) of the Directive. The Directive also stipulates that a comprehensive list of such firms must be enclosed with the application for the concession and must be updated following any subsequent changes in the relationship between firms. Since this list is comprehensive, the concessionaire may not cite the non-applicability of the advertising rules as grounds for awarding a works contract to a firm which does not figure on the abovementioned list.

Consequently the concessionaire is always obliged to make known his intention to award a works contract to a third party whether or not he is an awarding authority.

Lastly, the Commission considers that a Member State is in breach of the provisions of Directive 93/37/EEC on works carried out by third parties if, without any invitation to tender, it uses as an intermediary a firm with which it is linked to award works contracts to third-party firms.

3.2.3. **Rules applicable to review**

Article 1 of Directive 89/665/EEC provides that 'Member States shall take the necessary measures to ensure that [. . .] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible' in the conditions set out in the Directives, 'on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law'.

This provision of the Directive applies to works concessions ([71]).

The Commission also draws attention to the requirements of Article 2(7) of Directive 89/665/EEC, which stipulates that 'the Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

This implies that the Member States must not take any material or procedural measures which might render ineffektive the mechanisms introduced by this Directive.

As for concessionaires who are awarding authorities, in addition to the obligations already mentioned above, public contracts awarded by them are subject to the obligation to state reasons laid down in Article 8 of Directive 93/37/EEC, which makes it compulsory for the awarding authority to give the reasons for its decision within fifteen days, and to the review procedures provided for by Directive 89/665/EEC.

3.3. CONCESSIONS IN THE UTILITIES SECTORS

Directive 93/38/EEC on contracts awarded by entities operating in the water, energy, transport and telecommunications sectors (hereinafter referred to as the 'utilities Directive') does not have any specific rules either on works concessions or on service concessions.

In deciding which rules apply, the legal personality of the grantor as well as his activity are therefore decisive elements. There are several possible situations.

In the first case, the State or other public authority not operating specifically in one of the four sectors governed by the utilities Directive awards a concession involving an economic activity in one of these four sectors. The rules and principles of the Treaty described above apply to this award, as does the works Directive if it is a works concession.

In the second case, a public authority operating specificially in one of the four sectors governed by the utilities Directive decides to grant a concession. The rules and principles of the Treaty are therefore applicable insofar as the grantor is a public entity. Even in the case of a works concession, only the rules and principles of the Treaty are applicable, since the works Directive does not cover concessions granted by an entity operating specifically in one of the four sectors governed by Directive 93/38/EEC.

Lastly, if the grantor is a private entity, it is not subject to either the rules or the principles described above ([72]).

The Commission is confident that the publication of this communication will help to clarify the rules of the game and to open up markets to competition in the field of concessions.

Moreover, the Commission wishes to emphasise that the transparency which the publication of this communication provides in no way prejudices possible future proposals for legislation on concessions, if this becomes necessary to reinforce legal certainty.

Lastly, the Court, which currently has preliminary matters before it ([73]), may further clarify elements deriving from the rules of the Treaty, the Diretives and case law. This communication may therefore be supplemented in due course in order to take these new elements into account.

([1]) OJ C 94, 7.4.1999, p. 4.

([2]) The Commission wishes to thank the economic operators, representatives of collective interests, public authorities and individuals whose input helped to improve this communication.

([3]) See point 2.1.2.4 of the Commission communication on public procurement in the European Union, COM(98) 143, adopted on 11 March 1998.

([4]) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).

([5]) Council Directive 93/37/EEC, mentioned above.

([6]) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1). Council Directive 93/36/EEC of 14 July 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1). Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

([7]) The best-known example of a public works concession is a contract whereby a State grants a company the right to build and exploit a motorway and authorises it to earn revenue by charging tolls.

([8]) Verification will have to be on a case by case basis, taking account of various elements such as the subject matter, duration and the amount of the contract, the economic and financial capacity of the concessionaire, as well as any other useful element which helps establish that the concessionaire effectively carries risk.

([9]) If recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract. Moreover, if the concessionaire receives whether directly or indirectly during the course of the contract or even when the contract comes to an end, payment (by way of reimbursement, covering losses etc.) other than connected with exploitation, the contract could no longer be regarded as a concession. In this situation, the compatibility of any subsequent financing should be considered in the light of any relevant Community law.

([10]) For example, the Commission has already been faced with cases where a consortium composed of contractors and banks undertook to carry out a project to meet the needs of the awarding authority, in exchange for reimbursement by the awarding authority of the loan taken out by the contractors with the banks, together with a profit for the private partners. The Commission interpreted these as public works contracts since the consortium did not undertake any exploitation, and therefore bore no attendant risk. The Commission came to the same conclusion in another case where, although the private partner carrying out the work was ostensibly exploiting the construction, the public authority had in fact guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

([11]) For example, if the toll for a motorway is set by the State at a level which does not cover operating costs.

([12]) For example, risks arising from changes in legislation during the life of the contract (such as changes in environmental protection which make it necessary to modify the construction, or changes in tax law which disrupt the financial arrangements in the contract) or the risk of technical obsolescence. Moreover, this type of risk is more likely to arise in the context of concessions, bearing in mind that these normally extend over a relatively long period of time.

([13]) It should be noted that economic risk exists where income depends on the amount of use. This holds true even in the case of a nominal toll, i.e. one borne by the grantor.

([14]) In a case investigated by the Commission, although the private partner was ostensibly exploiting the construction, the public authority had guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

([15]) The absence of a reference to the concept of service concessions in the services Directive calls for some comment. Although, when preparing this Directive, the Commission had proposed including a special arrangement for this type of concession similar to the existing arrangement for works concessions, the Council did not accept this proposal. The question of wheather the granting of service concessions falls entirely under the arrangements introduced by the services Directive was therefore raised. As specified above, this Directive applies to 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', with certain exceptions which are described in the Directive and which do not include concession contracts.
A literal interpretation of this definition, followed by certain authors, could lead to inclusion of concession contracts within the scope of the services Directive, since these are for pecunciary interest and concluded in writing. This approach would mean that the granting of a service concession would have to comply with the rules set out in this Directive, and would hence be subject to a more complex procedure than works concessions.
However, in the absence of Court case law on this point, the Commission has not accepted this interpretation in the actual cases it has had to investigate. A preliminary matter pending before the Court raises the question of the definition of service concessions and the legal arrangements which apply to them (Case C-324/98 Telaustria Verlags Gesellschaft mbH v. Post & Telekom Austria (Telaustria)).

([16]) Judgment of 26 April 1994, Case C-272/91 Commission v. Italy (Lottomatica), ECR I-1409.

([17]) Conclusions of Advocate-General La Pergola in Case C-360/96. Arnhem.
Conclusions of Advocate-General Alber in Case C-108/98, RI.SAN Srl v. Comune d'Ischia.

([18]) In its judgment of 10 November 1998 in Case C-360/98 (Arnhem), para. 25, the Court concluded that it could not be a public service concession on the grounds that the remuneration consisted solely of a sum paid by the public authority and not of the right to operate the service.

([19]) Conclusions of the Advocate-General in the Arnhem case; Conclusions of the Advocate-General in the RI.SAN Srl case; both referred to above.

([20]) Judgment of 19 April 1994, case C-331/92, Gestión Hotelera, ECR I-1329.

([21]) Judgment of 5 December 1989, Case C-3/88, Data Processing, ECR, p. 4035.

([22]) Moreover, the Court has already applied the same principle in order to delimit supply contracts and services in its judgment of 18 November 1999 on Case C-107/98, Teckal Srl v. Comune di Viano and AGAC di Reggio Emilia (Teckal).

([23]) In the largest sense, i.e. the acts adopted by all public bodies belonging to the organisation of the State (local authorities, regions, departments, autonomous communities, municipalities) as well as any other entity which, even if it has its own legal existence, is linked to the State in such a tight manner that it is to be considered to be part of the State's organisation. The notion of acts of State also comprises acts which are attributable to the State, that is acts for which the public authorities are responsible, even though not adopted by them, given that the authorities can intervene to prevent their adoption or impose amendments.

([24]) A similar line of reasoning should be followed for supply concessions, which must be viewed in the light of Articles 28 to 30 (ex Articles 30 to 36) of the Treaty.

([25]) For example, taxi concessions, authorisations to use the public highway (newspaper kiosks, café terraces), or acts relating to pharmacies and filling stations.

([26]) Similar to 'in-house' relationships. The latter issue was first analysed by Advocates-General La Pergola (in the Arnhem case referred to above), Cosmas (in the Teckal case referred to above) and Alber (in the RI.SAN case referred to above).

([27]) In the abovementioned Teckal case, the Court laid down that, for Directive 93/36/EEC to apply, 'it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority', and added 'The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities' (recital 50).

([28]) Cases C-94/99 ARGE and C-324/98 Telaustria referred to above.

([29]) In the audiovisual sector, account should be taken of the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1 May 1999).

([30]) Judgments of 30 April 1974, Case 155/73, Sacchi, and of 18 June 1991, Case C-260/89, Elleniki Radiophonia.

([31]) Elleniki Radiophonia judgment mentioned above, point 10.

([32]) Elleniki Radiophonia judgment mentioned above, point 12.

([33]) It is worth pointing out that in the transport sector, the relevant rules on freedom to provide services are set out in Article 51 (ex Article 61) which refers to Articles 70 to 80 (ex Articles 74 to 84) of the Treaty. This is without prejudice to the fact that as the Court has consistently held, the general principles of Community law are applicable to the sector (see the judgments of 4 April 1974, Case C-167/73, Commission v. France, of 30 April 1986. Joined Cases 209/84 and 213/84, Ministère Public v. ASJES e. al., of 17 May 1994, Case C-18/93, Corsica ferries, of 1 October 1998, Case C-38/97 Autotrasporti Librandi snc v. Cuttica).
Moreover, transport services by rail, road and inland waterway are covered by Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, which set out the mechanisms and procedures that public authorities can employ to ensure that their objectives for public transport are met.

([34]) Obviously, acts and behaviour of the concessionaire to the extent that these are attributable to the State within the meaning of the case law of the Court of Justice are governed by the above rules and principles.

([35]) Judgment of 9 July 1987 Joint Cases 27/86; 28/86 and 29/86, Bellini.

([36]) Judgments of 10 March 1987, Case 199/85, Commission v. Italy, and of 17 November 1993, Case C-71/92, Commission v. Spain.

([37]) Lottomatica judgment mentioned above. In this judgment, the Court of Justice ruled that, in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and, as such, were subject to the provisions of the Treaty.

([38]) The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 43 (ex Article 52) and 49 (ex Article 59) of the Treaty if they are not motivated by overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.

([39]) Judgment of 8 October 1980. Case 810/79, Überschär.

(40) Judgment of 13 July 1993, Case C-330/91, Commerzbank; also see Judgment of 3 February 1982, Joined Cases 62 and 63/81, Seco and Desquenne.

(41) Judgment of 26 February 1992, Case C-357/89.

(42) Judgment of 7 July 1992, Case C-295/90.

(43) Judgment of 22 June 1993, Case C-243/89, Storebaelt, point 37.

(44) Judgment of 25 April 1996, Commission v. Belgium, Case C-87/94. Walloon Buses. See also Judgment of the Court of First Instance (hereinafter referred to as the 'CFI') of 17 December 1998, T-203/96, Embassy Limousines & Services.

(45) In this respect, it is worth emphasising that this Communication does not prejudge the interpretation of specific transport rules provided for by the Treaty at in current or future regulations.

(46) Thus, for example, even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the awarding authority (and this will often be the case for complex infrastructure projects), such improvements may not relate to the basic requirements of a project and must be delimited.

(47) Data processing, judgment mentioned above, point 30.

(48) Walloon Buses Judgment, referred to above, point 54.

(49) Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia, point 31.

(50) Transparency can be ensured, among other means, by way of publishing a tender notice, or pre-information notice in the daily press or specialist journals or by posting appropriate notices.

(51) Judgment of 11 July 1989, Case 265/87, Schröder, ECR p. 2237, point 21.

(52) Judgment of 27 October 1993, Case 127/92, point 27.

(53) Judgment of 19 June 1980, Joined Cases 41/79, 121/79 and 796/79, Testa et al., point 21.

(54) This is for example the case concerning the obligation to achieve a high level of environmental protection regarding application of the precautionary principle.

(55) See for example the judgment of 17 May 1984, Case 15/83, Denkavit Netherlands or the judgment of the CFI of 19 June 1997, Case T-260/94, Air Inter SA, point 14.

(56) Cf. the CFI's recent case law according to which the Treaty is applicable 'when a measure adopted by a Member State constitutes a restriction of the freedom of establishment of nationals of other Member States on its territory and at the same time provides advantages to an enterprise by granting it an exclusive right, unless the aim of the measure taken by the State is legitimate and compatible with the Treaty and is permanently justified by overriding considerations of general interest [. . .]'. In such cases, the CFI adds that 'it is necessary that the measure taken by the State be suited to ensuring the objective it is pursuing is achieved, and does not go beyond what is required to achieve that objective.' (Judgment of 8 July 1999, Case T-266/97, Vlaamse Televisie Maatschappij NV, point 108).

(57) This principle derives from case law relating to freedom of establishment and freedom to provide services (in particular in the Vlassopoulou Judgment of 7 May 1991 (Case C-340/89) and the Dennemeyer Judgment of 25 July 1991 (Case C-76/90). In the first Judgment, the Court of Justice found that 'even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in exercising their right of establishment guaranteed to them by Article 43 (ex Article 52) of the EC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.' In the Dennemeyer Judgment the Court stated in particular that 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishments and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.' Lastly, in the Webb case (of 17 December 1981, Case 279/80), the Court added that the freedom to provide services requires that '[. . .] the Member States in which the service is provided [. . .] takes into account the evidence and guarantee already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.'

(58) For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities. Apart from applying the technical harmonisation directives, agreements on mutual recognition of voluntary certification systems can constitute proof that the qualifications of enterprises are equivalent; these agreements can be based on accreditation, which provide proof that the conformity assessment body is competent.

(59) Judgment of 15 March 1988, Case 147/86, Commission v. Greece.

(60) Judgment of 21 June 1974, Case 2/74, Reyners.

(61) Conclusions of Advocate-General Mischo in Case C-3/88, Data Processing, referred to above.

(62) Judgment of 15 March 1988, Case 147/86, referred to above.

(63) Cases C-3/88 and C-272/91, Data Processing and Lottomatica, referred to above.

(64) Case T-260/94, Air Inter SA, referred to above. For example, the Court rejected the application of the exception relating to public policy when it was supported by insufficient reasons and the objective could be achieved by other means which did not restrict freedom of establishment or freedom to provide services (recital 15 of the Judgment C-3/88, Data Processing, referred to above.)

(65) Judgment of 28 March 1996, Case C-272/94, Guiot/Climatec.

(66) Judgment of 7 May 1991, Case C-340/89, Vlassopoulou, point 22.

(67) Judgment of 15 October 1987, Case 222/86, Heylens, point 14.

(68) 'In order to meet the Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts' (Judgment of 20 September 1988, Case 31/87, Beentjes, point 21).

([69]) It should be reiterated that, under Article 3(2) of the Directive, the contracting authority may require the concessionaire to award to third parties contracts representing a minimum percentage of the total value of the work. The contracting authority may also request the candidates for concession contracts to specify this minimum percentage in their tenders.

([70]) This is also the case for service concessionaires who are awarding authorities under these Directives. The provisions of the Directives apply to procedures to award concession contracts.

([71]) In this context, it should be noted that Advocate-General Elmer, in Case C-433/93, Commission v. Germany, found that according to the case law of the Court (the Judgments of 20 September 1988, in Case 31/87, Beentjes, and 22 June 1989, in Case 103/88, Constanzo) 'the Directives on public contracts confer on individuals rights which they may exercise, in certain conditions, directly before the national courts, *vis-à-vis* the State and awarding authorities'. The Advocate-General also maintainted that Directive 89/665/EEC, adopted after this judgment, did not seek to restrict the rights which case law confers on individuals *vis-à-vis* public authorities. On the contrary, the Directive sought to reinforce 'the existing arrangements at both national and Community levels . . . particularly at a stage when infringements can be corrected' (second recital of Directive 89/665/EEC).

([72]) Nonetheless, insofar as the concessionaire has exclusive or special rights for activities governed by the Utilities Directive, he must comply with this Directive's rules on public contracts.

([73]) For example, the Telaustria case referred to above.

Prior notification of a concentration

(Case COMP/M.1961 — NHS/MWCR)

(2000/C 121/03)

(Text with EEA relevance)

1. On 18 April 2000 the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 ([1]), as last amended by Regulation (EC) No 1310/97 ([2]), by which the undertakings Nuova Holding Subalpina SpA (NHS), belonging to the Sanpaolo/IMI Group, and the MWCRLux Sarl, controlled by Schroders Group, acquire, within the meaning of Article 3(1)(b) of the Regulation, joint control of the Italian company MWCR SpA, by way of purchase of assets.

2. The business activities of the undertakings concerned are:

— NHS: retail banking and financial services,

— MWCRLux Sarl: retail banking and financial services.

3. On preliminary examination, the Commission finds that the notified concentration could fall within the scope of Regulation (EEC) No 4064/89. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent by fax (No (32-2) 296 43 01 or 296 72 44) or by post, under reference COMP/M.1961 — NHS/MWCR, to:

European Commission,
Directorate-General for Competition,
Directorate B — Merger Task Force,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels

([1]) OJ L 395, 30.12.1989, p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13.
([2]) OJ L 180, 9.7.1997, p. 1; corrigendum: OJ L 40, 13.2.1998, p. 17.

Initiative on Public Private Partnerships and Community Law on Public Procurement and Concessions

Guidance on setting up Institutionalised Public-Private Partnerships

On 5 February 2008 the Commission adopted an Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP).

The Communication explains the EC rules to comply with when private partners are chosen for IPPP. Depending on the nature of the task (public contract or concession) to be attributed to the IPPP, either the Public Procurement Directives or the general EC Treaty principles apply to the selection procedure of the private partner. The Communication expresses the view of the Commission that under Community law one tendering procedure suffices when IPPP are set up. Accordingly, Community law does not require a double tendering — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — when IPPP are established.

The Communication also states that as a matter of principle IPPP must remain within the scope of their initial object and cannot obtain any further public contracts or concessions without a procedure respecting Community law on public contracts and concessions. However, it is acknowledged that IPPP are usually set up to provide services over a fairly long period and must, thus, be able to adjust to certain changes in the economic, legal or technical environment. The Communication explains the conditions under which these developments could be taken into account.

The Communication will be published in all official Community languages in the first half of 2008.

- Press release (18.2.2008)
- Frequently asked questions (18.2.2008) de fr
- Communication C(2007) 6661 de en fr

Political conclusions drawn from the public consultation – the PPP Communication

Following the public debate on the PPP Green Paper (see below), the Commission adopted on 15 November 2005 the Communication on PPPs and Community Law on Public Procurement and Concessions. This Communication presents policy options with a view to ensuring effective competition for PPPs without unduly limiting the flexibility needed to design innovative and often complex projects.

- Press release (17.11.2005)
- Frequently asked questions (17.11.2005)

- Communication COM(2005) 569
- Report on the Public Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions - SEC(2005) 629 en

Presentation of the Green Paper

The term public-private partnership ("PPP") is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.

This Green Paper analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions. Under Community law, there is no specific system governing PPPs. PPPs that qualify as "public contracts" under the Directives coordinating procedures for the award of public contracts must comply with the detailed provisions of those Directives. PPPs qualifying as "works concessions" are covered only by a few scattered provisions of secondary legislation and PPPs qualifying as "service concessions" are not covered by the "public contracts" Directives at all. Nevertheless, all contracts in which a public body awards work involving an economic activity to a third party, whether covered by secondary legislation or not, must be examined in the light of the rules and principles of the EC Treaty including in particular the principles of transparency, equal treatment, proportionality and mutual recognition.

The aim of the Green Paper is to explore how procurement law applies to the different forms of PPP developing in the Member States, in order to assess whether there is a need to clarify, complement or improve the current legal framework at the European level.

It therefore describes the ways in which the rules and the principles deriving from Community law on public contracts and concessions are applied when a private partner is being selected, and for the subsequent duration of the contract, in the context of different types of PPP. The Green Paper also asks a set of questions intended to find out more about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suitable for the requirements and characteristics of PPPs.

- Press release (4.5.2004)
- Green paper - COM(2004)327

Contributions to the PPP Green Paper consultation authorised for publication

- Public authorities
- Associations
- Undertakings
- Other organisations and individuals

The last contributions added to the list are presented on the homepage.

Related documents

- Explanatory Note - Competitive Dialogue - Classic Directive
  de en fr
- New Community Directives coordinating the procedures for the award of public contracts
  - Directive 2004/17/EC
  - Directive 2004/18/EC

- Interpretative Communication on concessions under Community law
- Decision of Eurostat on deficit and debt - Treatment of public-private partnerships de en fr

Useful links

- Green Paper on services of general interest and follow up
- Speech of Mr. Charlie McCreevy, Commissioner for Internal Market and Services "Public-Private Partnerships – Options to ensure effective competition" of 17 November 2005
- European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)

Public procurement: Commission issues guidance on setting up Institutionalised Public-Private Partnerships – Frequently Asked Questions

Reference: MEMO/08/95 Date: 18/02/2008

HTML: EN
PDF: EN
DOC: EN

MEMO/08/95

Brussels, 18 February 2008

Public procurement: Commission issues guidance on setting up Institutionalised Public-Private Partnerships – Frequently Asked Questions

(see** IP/08/252**)

What are Institutionalised Public-Private Partnerships (IPPP)?

There is no legal definition of IPPP in Community law. The Commission understands IPPP as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity.

What prompted the Commission to issue the Interpretative Communication on IPPP?

Public authorities at all levels are increasingly interested in co-operating with the private sector when ensuring the provision of an infrastructure or a service. The interest in private capital for public undertakings and the transfer of know-how from the private to the public sector are drivers for public bodies to found IPPP.

The public consultation launched by the PPP Green Paper (IP/04/593) showed that there was considerable need for clarification on the application of the Community rules on Public Procurement and Concessions applying to the setting up and operation of IPPP (see also IP/05/1440). The Interpretative Communication on IPPP aims at enhancing legal certainty in this area and at giving full effect to EC public procurement rules. This in turn should enable all interested economic operators to tender for IPPP on a fair and transparent basis in the spirit of the European internal market, thereby enhancing the quality of such projects and cutting their costs by means of increased competition.

Both the European Parliament (see Resolution on PPP of 26 October 2006) and a number of Member States asked the Commission to come forward with guidance on the issue of IPPP.

What is the nature of an Interpretative Communication of the Commission?

An Interpretative Communication of the Commission is an autonomous act of this institution, meaning that the validity of it does not depend on decisions of the European Parliament, the Council or any other institution. This also means that these acts are only committing the Commission itself, in particular when it comes to infringement procedures against Member States for not complying with EC law (Article 226 EC Treaty). The binding interpretation of Community law is ultimately the role of the European Court of Justice.

How does Community law on public procurement and concessions apply to the choice of private partners for IPPP?

At Community level there are no specific rules governing the founding of IPPP.

Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP, or when granting a public contract or a concession to the public-private entity.

Conversely, the Commission does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical.

If the task assigned to the public-private entity is a public contract fully covered by the Public Procurement Directives, the procedure for selecting the private partner is determined by these Directives. If the task is a works concession or a public contract that is only partially covered by the Directives, the fundamental principles derived from the EC Treaty apply in addition to the relevant provisions of the Directives. Finally, if it is a service concession or a public contract not covered by the Directives, the selection of the private partner has to comply with the principles of the EC Treaty.

Does the Interpretative Communication on IPPP aim to liberalise or privatise services of general economic interest?

No, the Interpretative Communication on IPPP does not aim to liberalise or privatise services of general economic interest. It remains the competence of national authorities to decide whether private parties are entrusted with the performance of services of general economic interest or not.

However, when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions.

The Interpretative Communication on IPPP follows the Commission's commitment to provide legal guidance in the area of services of general interest as expressed in the “Communication on services of general interest, including social services of general interest” of 20 November 2007.

Will the definition of in-house relations be modified by the Interpretative Communication on IPPP?

EU law on public contracts and concessions applies when a contracting body entrusts a task to a third party, unless the relation between the two is so close that the latter is equivalent to an ‘in-house’ entity

Today, the in-house definition is determined by case law of the European Court of Justice (ECJ). According to the *Stadt Halle* jurisprudence of the ECJ (C-26/03) the Public Procurement Directives apply whenever a contracting authority intends to conclude a contract with a company, the capital of which is at least partly held by private undertakings.

There is no compelling evidence at present to suggest that the quality of public services could be improved or prices be reduced, if private or public-private undertakings obtain public service missions without a preceding competitive award procedure. Thus, the Commission does not intend to change the “in-house” concept as understood by the ECJ. The Interpretative Communication on IPPP demonstrates that this jurisprudence does not constitute any obstacles to the

setting up of IPPP.

Are co-operations between municipalities covered by the Interpretative Communication on IPPP?

No, the Interpretative Communication on IPPP focuses on partnerships between public and private entities only.

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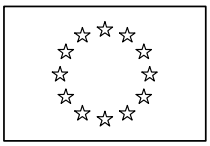

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05.02.2008
C(2007)6661

COMMISSION INTERPRETATIVE COMMUNICATION

on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)

(Text with EEA relevance)

COMMISSION INTERPRETATIVE COMMUNICATION

on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)

1. INTRODUCTION

In recent years, Public-Private Partnerships (PPP) have developed in many fields. The hallmark of this form of cooperation, which is generally geared to the longer term, is the role of the private partner, who is involved in the various phases of the project (planning, implementation and operation), who is intended to bear risks that are traditionally borne by the public sector and who often contributes to financing the project.

Under Community law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a PPP. However, if public bodies decide to involve third parties in economic activities and if this involvement qualifies as a public contract or a concession, the Community provisions for public procurement and concessions must be complied with. The aim of these provisions is to enable all interested economic operators to tender for public contracts and concessions on a fair and transparent basis in the spirit of the European internal market, thereby enhancing the quality of such projects and cutting their costs by means of increased competition[1].

The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions[2] showed[3] that there was considerable need for clarification on the application of these rules to so-called "institutionalised" PPP (IPPP). IPPP are understood by the Commission as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions.[4] The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies, do not constitute IPPP and are therefore not covered by the present Communication.

The perceived lack of legal certainty in relation to the involvement of private partners for IPPP may undermine the success of such projects. The risk of

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1 The European Parliament noted in this connection that compliance with these rules "can be an effective mechanism for preventing inappropriate restrictions on competition by enabling, at the same time, the public authorities themselves to lay down and monitor conditions for ensuring quality, availability, social standards and compliance with environmental requirements" (European Parliament Resolution on the Green Paper on Services of General Interest [P5_TA(2004)0018], paragraph 32).

2 COM(2004) 327 of 30.4.2004.

3 Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM(2005) 569 of 15.11.2005, page 9.

4 The Member States use different terminology and schemes in this context (for instance Kooperationsmodell, Joint Ventures, Sociétés d'Economie Mixte).

establishing structures based on contracts which might subsequently turn out to be non-compliant with EC law may discourage public authorities or private parties from entering into IPPP at all.

The European Parliament, in its Resolution on Public-Private Partnerships of 26 October 2006[5], acknowledged that practitioners want clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession, and it called on the Commission to provide the relevant clarifications at the earliest opportunity.

The present Communication sheds light on the Commission's understanding of how the Community provisions on public procurement and concessions[6] are to be applied to the founding and operation of IPPP.[7] The Communication aims at enhancing legal certainty and, in particular, assuaging repeatedly expressed concerns that applying Community law to the involvement of private partners into IPPP would make these arrangements unattractive or even impossible. The present Communication is part of the Commission's commitment to provide legal guidance in the area of services of general interest as set out in the Commission Communication on services of general interest, including social services of general interest[8] of 20 November 2007.

This Communication does not create any new legislative rules. It reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and the relevant case-law of the European Court of Justice (ECJ). It should be noted that, in any event, the binding interpretation of Community law is ultimately the role of the ECJ.

2. THE FOUNDING OF AN IPPP

2.1. Principles

At Community level there are no specific rules governing the founding of IPPP. However, in the field of public procurement and concessions, the principle of equal treatment and the specific expressions of that principle, namely the prohibition of discrimination on grounds of nationality and Articles 43 EC on freedom of establishment and 49 EC on freedom to provide services, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party.[9]

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5 P6_TA(2006)0462, paragraph 35.

6 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment; 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment (see Article 1 paragraph 2 [3] and [4] of Directive 2004/18/EC, OJ L 134 of 30.4.2004, page 114).

7 The present Communication does not cover those public service contracts and service concessions to which Article 5 paragraphs 2 to 7 of Regulation (EC) 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315 of 3.12.2007, page 1) apply.

8 COM(2007) 725 of 20.11.2007; see also the Commission Staff Working Document "Frequently asked questions concerning the application of public procurement rules to social services of general interest" SEC(2007) 1514 accompanying the Communication of 20.11.2007.

9 Case C-458/03, Parking Brixen, ECR 2005, I-8612, paragraph 61.

More specifically, the principles arising from Article 43 EC and Article 49 EC include not only non-discrimination and equality of treatment, but also transparency, mutual recognition and proportionality.[10] For cases which are covered by the Directives on the coordination of procedures for the award of public contracts[11] ("the Public Procurement Directives"), detailed provisions apply.

The fact that a private party and a contracting entity[12] co-operate within a public-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity. In fact, the ECJ held[13] that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant excludes in any event the possibility of an in-house relationship – to which, in principle, public procurement law does not apply – between that contracting entity and that company.[14]

2.2. The founding process

In practice, an IPPP is usually set up

- either by founding a new company, the capital of which is held jointly by the contracting entity and the private partner – or, in certain cases, by several contracting entities and/or several private partners – and awarding a public contract or a concession to this newly founded public-private entity

- or by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions "in-house" in the past.

Irrespective of how the IPPP is set up, Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP[15], or when granting a public contract or a

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10 Cf. Commission interpretative communication on concessions under Community law, OJ C 121 of 29.4.2000, page 6.

11 Directive 2004/18/EC, see footnote 6 above, and Directive 2004/17/EC, OJ L 134 of 30.4.2004, page 1.

12 In this Communication the term "contracting entity" covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

13 Case C-26/03, Stadt Halle, ECR 2005, I-1, paragraph 49.

14 According to the ECJ (Case C-410/04, ANAV, ECR 2006, I-3303, paragraphs 30 et seq) it is not only the actual participation of a private party in the capital of a publicly owned company that excludes the in-house status of a publicly owned company, but also a contracting entity's intent to open up the capital of its daughter company to private third parties in the future. Thus, public contracts or concessions could not be awarded "in-house" to publicly owned companies the capital of which is intended to be opened to private parties in the course of the performance of the respective public contracts or concessions. Conversely, the theoretical possibility of a private party participating in the capital of a public authority's subsidiary does not, as the Commission sees it, in itself undermine the in-house relationship between the contracting entity and its company.

15 A fair and transparent selection of the private partner of an IPPP ensures that the objective of free and undistorted competition is met and the principle of equal treatment is complied with, in particular by avoiding undue advantages of the private undertaking with a capital presence in the IPPP over its competitors. Thus, the founding of an IPPP via a fair and transparent selection of the private partner of

concession to the public-private entity.[16] It is important to note that public authorities are not permitted "to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies".[17]

In any case, the Commission does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical.

One possible way of setting up an IPPP, which is, in the Commission's view, suitable for complying with the principles of Community law while at the same time avoiding a double tendering procedure, is as follows: The private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession[18] which is to be awarded to the future public-private entity, and the private partner's operational contribution to perform these task and/or his contribution to the management of the public-private entity. The selection of the private partner is accompanied by the founding of the IPPP and the award of the contract or concession to the public-private entity.

2.3. The selection of private partners for IPPP

2.3.1. Legal Basis

If the task assigned to the public-private entity is a public contract fully covered by the Public Procurement Directives, the procedure for selecting the private partner is determined by these Directives. If the task is a works concession or a public contract that is only partially covered by the Directives, the fundamental principles derived from the EC Treaty apply in addition to the relevant provisions of the Directives. In case of services listed in Annex II B of Directive 2004/18/EC the fundamental principles of the EC Treaty as set out in Articles 43 and 49 apply if these contracts can be expected to be of certain interest to undertakings located in a different Member State to that of the relevant contracting entity[19]. Finally, if it is a service concession or a public contract not covered by the Directives, the selection of the private partner has to comply with the principles of the EC Treaty.

The case law cited in this document refers in part to public contracts that are fully covered by the Public Procurement Directives. However, since this case law is often based on principles of the EC Treaty it may also be pertinent when applying Community law to other situations, such as concessions or to public contracts that are not, or not fully, covered by the Directives.[20]

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this public-private entity meets the respective concerns expressed by the ECJ in Case C-26/03, Stadt Halle, see footnote 13 above, paragraph 51.

16 Contracting entities are entitled to award public contracts covered by Directive 2004/17/EC directly to their affiliated undertakings as defined in Article 23 of this Directive.

17 Case C-29/04, Commission v. Austria, ECR 2005, I-9705, paragraph 42.

18 If the IPPP in question is set up by the participation of a private partner in an existing publicly owned company, the subject of the selection procedure of the private partner for this IPPP could be the award of public contracts or concessions which were performed "in-house" by the respective publicly owned company in the past.

19 Case C-507/03, Commission v. Ireland, [2007], paragraph 32, not yet published in the ECR.

20 See for guidance on the award of these contracts Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public

2.3.2. *Procurement Procedure*

If the founding of an IPPP involves the award of a public contract fully covered by Directive 2004/18/EC to a public-private entity, the open and restricted procedures defined in that Directive may, due to the particular financial or legal complexity of such contracts, not offer sufficient flexibility. For cases like this, Directive 2004/18/EC introduced a new innovative procedure – the competitive dialogue[21] – the aim of which is not only to preserve competition between economic operators but also to take into account the contracting authorities' need to discuss all aspects of the contract with each candidate.[22]

For the award of public contracts fully covered by Directive 2004/18/EC the negotiated procedure with publication of a contract notice can only be used in exceptional cases.[23] Conversely, contracting entities could always resort to the negotiated procedure with publication of a contract notice when awarding concessions or public contracts other than those fully covered by Directive 2004/18/EC.

2.3.3. *Information about the project*

If the public task connected with the setting up of an IPPP falls within the scope of the Public Procurement Directives, or of sector-specific Community rules providing for public procurement obligations[24], special requirements for publication must be complied with.[25] With regard to other public contracts and to service concessions, the principles of transparency and equal treatment arising from the EC Treaty[26] require potential bidders to have equal access to suitable information about the intent of a contracting entity to set up a public-private entity and to award it a public contract or a concession. Suitable information can best be guaranteed by publicising a notice that is sufficiently accessible to potentially interested parties before the private partner is selected.

2.3.4. *Permitted selection and award criteria and transparency requirements for the criteria*

In the Commission's view, Community law requires the contracting entity to publicise the selection and award criteria for identifying the private partner for the IPPP. The criteria used must comply with the principle of equal treatment. This applies both to public contracts fully covered by the Public Procurement Directives[27] and in the view of the Commission also to other public contracts and concessions.

Procurement Directives, OJ C 179 of 1.8.2006, page 2. A number of Member States and the European Parliament have asked the Court of First Instance to annul that Communication. At the time of the adoption of the present Communication the case is still pending before the Court of First Instance.

21 See Article 29 of Directive 2004/18/EC.

22 See recital 31 of Directive 2004/18/EC.

23 See Articles 30 and 31 of Directive 2004/18/EC.

24 See for example Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ. L 15 of 23.1.1993, p. 33.

25 See Articles 41 et seq of Directive 2004/17/EC and Articles 35, 36 and 58 of Directive 2004/18/EC.

26 Case C-324/98, Telaustria, ECR 2000, I-10745, paragraphs 60 and 61.

27 Case C-19/00, SIAC Constructions, ECR 2001, I-7725, paragraphs 41-45; Case C-31/87, Beentjes, ECR 1988, page 4635, paragraphs 29 et seq.

The choice of the tenderers or the candidates who will participate in the tendering procedure and the choice between the bids submitted must be made on the basis of these criteria, and the contracting entity needs to follow the procedural rules and basic requirements originally laid down.[28]

The Public Procurement Directives specify objective requirements related to the personal capacity of the private partner, such as the personal situation of the candidate, his economic and financial standing, his suitability to pursue the professional activity in question and his technical and/or professional ability.[29] Such criteria may also be used in the context of concessions and public contracts not fully covered by the Public Procurement Directives.

In the area of social services of general interest clarifications on possible selection and award criteria have been made in the Commission Staff Working Document "Frequently asked questions concerning the application of public procurement rules to social services of general interest".[30]

2.3.5. Specific elements of statutes and articles of association, the shareholder agreement and the public contract or concession

The principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition.[31] In the context of the founding of an IPPP, this obligation implies, in the view of the Commission, that the contracting entity should include in the contract notice or the contract documents basic information on the following: the public contracts and/or concessions which are to be awarded to the future public-private entity, the statutes and articles of association, the shareholder agreement and all other elements governing the contractual relationship between the contracting entity and the private partner on the one hand, and the contracting entity and the future public-private entity on the other hand. If the contracting entity applies the competitive dialogue or the negotiated procedure, some of this information may not need to be fixed in advance but could be left to be identified and defined during the dialogue or the negotiation with the candidates. The call for competition should include some information on the intended duration of the public contract or concession to be performed by the public-private entity.

In the Commission's opinion, the principle of transparency requires the disclosure in the tender documents of optional renewals or modifications of the public contract or concession initially awarded to the public-private entity and the disclosure of optional assignments of additional tasks. The tender documents should cover at least the number and conditions of these options. The information thus provided should be sufficiently detailed, in order to ensure fair and effective competition.

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28 Even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the contracting entity (and this will often be the case for IPPP), such modifications may not relate to the basic requirements of the project and must be delimited.

29 Articles 45 to 48 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.

30 See footnote 8 above.

31 Case C-324/98, Telaustria, see footnote 26 above, paragraph 62; Case C-458/03, Parking Brixen, see footnote 9 above, paragraph 49.

It is advisable that the contract between a contracting entity and the private partner determines from the outset what happens if the public-private entity does not receive public contracts in the future and/or public contracts which have already been awarded are not extended. In the view of the Commission the statutes and articles of association should be so formulated that it is possible to change the private partner in the future. As the private partner cannot automatically be excluded from participating in a renewed tender procedure, the contracting entity must pay in such a case particular attention to the obligation of transparency and equal treatment of all bidders.

3. THE PHASE AFTER FOUNDING OF THE IPPP

The ECJ held that companies, the capital of which is open, at least in part, to private parties are precluded from being regarded as structures for the "in-house management" of public services on behalf of the contracting entities which form part of them.[32] This means that procurement rules, whether derived from the EC Treaty or from the Public Procurement Directives, must also be respected when awarding to the public-private entity public contracts or concessions, other than those public contracts and concessions that have already been subject to competition in the tender procedure for the founding of the IPPP in question. In other words, IPPP must remain within the scope of their initial object and can as a matter of principle not obtain any further public contracts or concessions without a procedure respecting Community law on public contracts and concessions.

However, as the IPPP is usually set up to provide a service over a fairly long period, it must be able to adjust to certain changes in the economic, legal or technical environment. Community provisions on public procurement and concessions do not rule out the possibility of taking into account these developments as long as the principles of equal treatment[33] and transparency[34] are upheld. Thus, should the contracting entity wish, for specific reasons, to be able to amend some conditions of the invitation to tender after the successful tenderer has been selected, it is required expressly to provide for that possibility, and for the relevant detailed rules, in the notice of invitation to tender or in the tender documents and to define the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders.[35]

Changes to essential terms of contracts not provided for in the initial tender documents require a new procurement procedure[36]. The ECJ considers the terms of a contract as essential, particularly if it is a condition which, had it been included in the contract notice or the tender documents, would have made it possible for tenderers to

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32 Case C-231/03, Coname, ECR 2005, I-7287, paragraph 26; Case C-410/04, ANAV, see footnote 14 above, paragraph 32.

33 See, inter alia, Joined Cases C-285/99 and C-286/99, Lombardini and Mantovani, ECR 2001 I-9233, paragraph 37, and Case C-315/01, GAT, ECR 2003, I-6351, paragraph 73.

34 See, inter alia, Case C-92/00, HI, ECR 2002, I-5553, paragraph 45, and Case C-470/99, Universale-Bau and Others, ECR 2002, I-11617, paragraph 91.

35 Case C-496/99 P, Commission v. CAS Succhi di Frutta SpA, ECR 2004, I 3801, paragraph 118.

36 Case C-337/98, Commission v. France, ECR 2000, I-8377, paragraph 50.

submit a substantially different tender.[37] Examples of such essential terms of a contract include the scope of the works undertaken or services performed by the contractor or the charges levied on the user of the service provided by the contractor.

It should be pointed out that, as far as public contracts fully covered by the Directives and works concessions are concerned, secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered may be awarded directly, without a call for competition.[38]

Under EC law, a public-private entity is – like any other economic operator – free to participate in public tenders.[39] This also applies to tendering procedures which have become necessary as a result of a major amendment to or extension of those public contracts or concessions which the public-private entity was awarded in the past by the contracting entity that set it up. In such a case, the contracting entity must pay particular attention to the obligation of transparency and equal treatment of all bidders. Specific safeguards have to be taken to ensure a strict separation of those preparing the call for tenders and deciding on the award of the contract within the contracting entity, on the one hand, and those managing the IPPP, on the other hand, and that no confidential information is passed on from the contracting entity to the public-private entity.

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37 Case C-496/99 P, Commission v. CAS Succhi di Frutta SpA, see footnote 35 above, paragraphs 116 et seq.

38 Articles 31 and 61 of Directive 2004/18/EC and Article 40 para 3 (f) and (g) of Directive 2004/17/EC. In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives, such as service concessions as well (See Opinion of Advocate General Jacobs in Case C-525/03, Commission v. Italy, paragraphs 46 to 48).The Commission considers as a matter of principle that modifications of essential terms of service concessions not catered for in the tendering documents are acceptable only if they are made necessary by unforeseen circumstances, not attributed to any of the contracting parties, or if they are justified on grounds of public policy, public security or public health (Article 46 EC Treaty).

39 Recital 4 to Directive 2004/18/EC requires Member States to ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.

Public procurement: Commission proposes clarification of EU rules on public-private partnerships

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Public procurement: Commission proposes clarification of EU rules on public-private partnerships

The European Commission has published a Communication with new policy options on Public-Private Partnerships (PPPs). The Communication follows a major public consultation which was launched by the PPP Green Paper in April 2004 (IP/04/593). The Commission will clarify how EU rules should apply to the choice of private partners in "institutionalised PPPs", which are public-service undertakings held jointly by both a public and a private partner. The Commission will also assess whether to propose a legislative initiative on concessions, to clarify both the term 'concessions' and the rules applicable to their award.

Internal Market and Services Commissioner Charlie McCreevy said: *"PPPs are vital to investment in Europe's infrastructure and public services. But to reap the full benefits of these partnerships and ensure value for money for taxpayers, we need transparency and fair competition in the selection of private partners. The goal towards which we strive is to provide transparent and non-discriminatory conditions that will enable private entities to contribute to setting up infrastructures and provide services throughout the EU in a way that delivers best value for taxpayers. We have now listened to all the views expressed during the consultation, which show a strong demand for further Commission action."*

A key aim of the 2004 consultation was to find out how the rules and principles work in practice and to see if they are clear enough and if they suit the challenges and characteristics of PPPs. The options are presented with a view to ensuring effective competition for PPPs without unduly limiting the flexibility needed to design innovative and often complex projects.

Institutionalised PPPs

Many respondents to the PPP Green Paper asked how EU rules should apply to the choice of private partners in "institutionalised PPPs" (IPPPs), which are public-service undertakings held jointly by both a public and a private partner. Overall, it appears at present that an Interpretative Communication would be better suited to

this demand than fully-fledged legislation. This Interpretative Communication should be published during 2006.

Concessions

A clear majority of participants in the consultation supported an EU initiative, legislative or non-legislative, on concessions, in order to clarify both the term 'concessions' and the rules applicable to their award. Having carefully considered all arguments and the factual information provided by stakeholders it appears that a legislative initiative is at present the preferable option.

However, the final decision on whether or not to take such a measure, and on its concrete shape, depends on further in-depth analysis, including an Impact Assessment, which will be carried out in 2006.

Background

Public-private partnerships (PPPs) are forms of cooperation between public authorities and businesses, which aim to carry out infrastructure projects or providing services for the public. These arrangements which typically involve complex legal and financial arrangements involving private operators and public authorities have been developed in several areas of the public sector and are widely used within the EU, in particular in transport, public health, public safety, waste management and water distribution.
The full text of the proposals is available at:

http://ec.europa.eu/internal_market/publicprocurement/ppp_en.htm

Frequently Asked Questions (FAQs) on public procurement: Commission proposes clarification of EU rules on public-private partnerships

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Brussels, 17 November 2005

Frequently Asked Questions (FAQs) on public procurement: Commission proposes clarification of EU rules on public-private partnerships

What are public-private partnerships (PPPs)?

Public-private partnerships (PPPs) are forms of cooperation between public authorities and businesses, with the aim of carrying out infrastructure projects or providing services for the public. These arrangements, which typically involve complex legal and financial arrangements, have been developed in several areas of the public sector and are widely used within the EU, in particular in the areas of transport, public health, public safety, waste management and water distribution.

What prompted the Commission to launch this initiative?

Public authorities at all levels are increasingly interested in co-operating with the private sector when ensuring the provision of an infrastructure or a service. In view of the importance of PPPs it was considered necessary to explore how procurement law applies to the different forms of PPP developing in the Member States, in order to assess whether there is a need to clarify, complement or improve the current legal framework at the European level.

To this end, the Commission adopted the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions on 30 April 2004 (IP/04/593). The public consultation launched by this Green Paper showed, however, that fair competition is not guaranteed throughout the EU at present. The PPP Communication presents policy options to address problems related to Community legislation on public procurement and concessions.

How does EU law on public procurement and concessions apply at present to the choice of private partners for PPPs?

Under EU law, there is no specific system governing the choice of private partners for PPPs.

PPPs that qualify as "public contracts" under the Directives coordinating procedures for the award of public contracts must comply with the detailed provisions of those Directives. PPPs qualifying as "works concessions" are covered only by a few scattered provisions of secondary legislation and PPPs qualifying as "service concessions" are not covered by the "public contracts" Directives at all.

Nevertheless, all contracts in which a public body awards work involving an economic activity to a third party, whether covered by secondary legislation or not, must be examined in the light of the rules and principles of the EC Treaty, in particular transparency, equal treatment, proportionality and mutual recognition.

What are concessions?

A key feature of concessions is the right of the concessionaire to exploit the construction or service granted as a reward for having erected the construction or delivered the service. The main difference from public contracts is the risk inherent in such exploitation which the concessionaire, usually providing the funding of at least parts of the relevant projects, has to bear. Such private capital involvement is considered to be one of the key incentives for public authorities to enter into PPPs.

What are Institutionalised PPPs?

Institutionalised PPPs are public-service undertakings held jointly by both a public and a private partner.

What was the result of the PPP Green Paper consultation?

In total the Commission received 195 substantial replies to the list of questions set out in the PPP Green Paper. Written contributions were received from governments or individual ministries from Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and the United Kingdom; 15 other public authorities from these Member States; 111 associations with private and/or public entities as their members; and 38 enterprises.

Both the European Economic and Social Committee and the Committee of the Regions adopted opinions on the PPP Green Paper.

In May 2005 the Commission published a report on the outcome of this consultation (IP/05/555). Key results from the consultation:

- A clear majority supported an EU initiative, legislative or non-legislative, on concessions (which are currently not subject to the detailed EU public procurement rules), in order to clarify both the term ‘concessions’ and the rules applicable to their award.

- Many respondents asked how EU rules should apply to the choice of private partners in “institutionalised PPPs” (i.e. public-service undertakings held jointly by both a public and a private partner).

What does the Commission propose to make the choice of private partners for PPPs more transparent and competitive?

For **Institutionalised PPPs** the Commission envisages the adoption of an Interpretative Communication aimed at clarifying the application of public procurement rules (1) to the establishment of mixed capital entities whose objective is to perform services of general (economic) interest and (2) to the participation of private firms in existing public companies that perform such tasks. The Commission aims to prepare this interpretative document on Institutionalised PPPs in the course of 2006.

From existing information, in particular the PPP Green Paper consultation, it appears that a legislative initiative on the **award of concessions** is at present the preferable option. However, the final decision on whether or not to take such a measure, and on its concrete shape, depends on further in-depth analysis, including an Impact Assessment, which will be carried out in 2006.

What would be the content of a possible legislative initiative on concessions?

The general EC Treaty principles applying to the award of concessions may need to be clearly spelt out.

In particular, this would require:

- formulating an obligation for the adequate advertising of the intention to award a concession;
- fixing rules governing the selection of concessionaires on the basis of objective, non-discriminatory criteria;
- concretising the principle of equality of treatment of all participants to the award of concessions.

Does the PPP initiative aim to liberalise or privatise services of general economic interest?

No, the PPP initiative does not aim to liberalise or privatise services of general economic interest. It remains the competence of national authorities to decide whether private parties are entrusted with the performance of services of general economic interest or not.

However, when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions.

Will the definition of in-house relations be modified by the PPP initiative?

EU law on public contracts and concessions applies when a contracting body entrusts a task to a third party, unless the relation between the two is so close that the latter is equivalent to an 'in-house' entity.

Today, the in-house definition is determined by case law of the European Court of Justice (ECJ). According to the *Stadt Halle* jurisprudence of the ECJ the Public Procurement Directives apply whenever a contracting authority intends to conclude a contract with a company, the capital of which is at least partly held by private undertakings.

There is no compelling evidence at present to suggest that the quality of public services could be improved or prices be reduced, if private undertakings obtain public-service missions without a preceding competitive award procedure. Thus, the Commission does not intend to change the "in-house" concept as understood by the ECJ.

To what extent are co-operations between municipalities covered by public procurement law? Will the PPP initiative change anything in this respect?

When a municipality awards certain services to another public entity against remuneration, this is in principle a service procured in the market. The contracted public entity is in competition with private enterprises and possibly also with other public entities offering the same service.

Conversely, public procurement law is not of application if the competence for a given service is transferred from one public body to another.

The Interpretative Communication on Institutionalised PPPs will aim to clarify to what extent Community law applies to the attribution of tasks to public bodies, and which forms of co-operation remain outside the scope of internal market provisions.

Would a legislative initiative on PPPs at EU level not just add to the multitude of rules which might constitute an obstacle for the smooth development of PPPs?

The PPP Green Paper consultation showed the demand for a stable, consistent legal environment for the award of concessions at EU level, in particular to enhance legal certainty. However, the Commission will intervene and propose legislative measures in this area only when an Impact Assessment shows that the benefits outweigh the potential drawbacks of such an initiative. In any case, future legislation should provide sufficient flexibility for the award of complex PPPs.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.11.2005
COM(2005) 569 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on Public-Private Partnerships and Community Law on Public Procurement and Concessions

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on Public-Private Partnerships and Community Law on Public Procurement and Concessions

(Text with EEA relevance)

1. INTRODUCTION

Public authorities at all levels are increasingly interested in co-operating with the private sector when ensuring the provision of an infrastructure or a service. The interest in such co-operation, commonly referred to as Public-Private Partnerships (PPPs), is partly due to the benefit public authorities could have from the know-how of the private sector, in particular in order to increase efficiency, partly this interest is due to public budget constraints. However, PPPs are not a miracle solution: for each project it is necessary to assess whether partnership really adds value to the specific service or public works in question, compared with other options such as concluding a more traditional contract.

Community law is neutral as regards whether public authorities choose to provide an economic activity themselves or to entrust it to a third party. If public authorities decide, however, to involve third parties in conducting an activity, Community law on public procurement and concessions may come into play.

The main purpose of Community law on public procurement and concessions is to create an Internal Market in which the free movement of goods and services and the right of establishment as well as the fundamental principles of equal treatment, transparency and mutual recognition are safeguarded and value for money obtained when public authorities buy products or mandate third parties with performing services or works. In view of the increasing importance of PPPs it was considered necessary to explore the extent to which existing Community rules adequately implement these objectives when it comes to awarding PPP contracts or concessions. This should enable the Commission to assess whether there is a need to clarify, complement or improve the current legal framework at European level. To this end, the Commission adopted the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions[1] on 30 April 2004.

The debate launched by the Green Paper met with considerable interest and was generally welcomed. The Commission received close to 200 contributions from a wide variety of respondents, including many of the Member States. Both the European Economic and Social Committee[2] and the Committee of the Regions[3]

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1 COM(2004) 327 final, 30.4.2004.

2 Opinion on the Green Paper on public-private partnerships and Community law on public contracts and concessions, Brussels, 27-28 October 2004, CESE 1440/2004.

adopted opinions on the Green Paper. In May 2005 a report analysing all contributions submitted in the course of the public consultation was published.[4]

This Communication presents the policy options following the consultation, with a view to ensuring effective competition for PPPs without unduly limiting the flexibility needed to design innovative and often complex projects. Stating its policy preferences at this stage is in line with the Commission's commitment to public accountability and to transparency in exercising its right of initiative, which is a basic principle of "Better Regulation for Growth and Jobs in the European Union".[5]

While this Communication seeks to draw policy conclusions from the PPP Green Paper consultation, the choice of options it sets out has to be seen in a wider context, including conclusions drawn from judgments of the European Court of Justice, experience with procedures the Commission launched under Article 226 EC Treaty against Member States and bilateral contacts with stakeholders.

While the consultation provided both factual information on practical experiences with PPPs and stakeholders' opinions on preferred policy options, it is no substitute for in-depth analysis of the impacts of such policies. Consequently, the final decision on possible legislative initiatives for clarifying, complementing or improving Community law on public procurement and concessions will be subject to impact assessment as required under "Better Regulation" principles.

2. KEY ISSUES FOR POSSIBLE FOLLOW-UP

2.1. Issues requiring follow-up at EC level

The PPP Green Paper covered a range of subjects related to PPPs and Community law on public contracts and concessions. The responses from stakeholders participating in the consultation suggest that only a few of these subjects require follow-up initiatives at EC level. These include, in particular:

- the award of concessions (questions 4 to 6 of the Green Paper – chapter 3 of this Communication) and
- the establishment of undertakings held jointly by both a public and a private partner in order to perform public services (Institutionalised PPPs – IPPPs) (questions 18 and 19 of the Green Paper – chapter 4 of this Communication).

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3 Opinion of the Committee of the Regions of 17 November 2004 on the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), ECOS-037.

4 SEC(2005) 629, 3.5.2005. This report and most of the contributions sent to the Commission are available on the Commission's website at: http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm.

5 See Communications from the Commission, European Governance: Better lawmaking, COM(2002) 275 final, 5.6.2002, and Better Regulation for Growth and Jobs in the European Union, COM(2005)97 final, 16.3.2005.

On both issues clear majorities of stakeholders asked for EC initiatives providing more legal certainty. Separate sections of this Communication present the appropriate follow-up measures.

2.2. The Competitive Dialogue: the Commission will provide clarification

One issue which met with considerable stakeholder interest was the Competitive Dialogue, a new award procedure specifically designed for complex public contracts, introduced by Directive 2004/18/EC. Few stakeholders contested the importance of this procedure. Many respondents to the consultation asked for full protection of intellectual property and for limiting resources bidders have to invest in this procedure.

The Commission is confident that practical experience with this procedure, not yet implemented in most of the Member States[6], will dissipate these concerns. As requested by a number of stakeholders, clarification of the provisions governing the Competitive Dialogue will be provided by means of an explanatory document which will be made accessible on the Commission's website.[7]

2.3. Issues where no separate EC initiative is proposed at this stage

2.3.1. No new legislation covering all contractual PPPs

All PPP set-ups qualify – in as far as they fall within the ambit of the EC Treaty – as public contracts or concessions. However, as differing rules apply to the award of public contracts and concessions, there is no uniform award procedure in EC law specifically designed for PPPs.

Against this background, the Commission asked stakeholders whether they would welcome new legislation covering all contractual PPPs, irrespective of whether they qualify as public contracts or concessions, making them subject to identical award arrangements (question 7 of the Green Paper).

The consultation revealed significant stakeholder opposition to a regulatory regime covering all contractual PPPs, irrespective of whether these are designated as contracts or concessions. Therefore, the Commission does not envisage making them subject to identical award arrangements.

2.3.2. No Community action on other specific aspects of PPPs

With regard to the issue of PPPs where the initiative comes from the private sector (question 9 of the Green Paper) the responses did not indicate any current need to take measures at EC level to foster such schemes.

There was no support either for Community initiatives clarifying the contractual framework of PPPs at Community level (question 14 of the Green Paper) or clarifying or adjusting the rules on subcontracting (question 17 of the Green Paper).

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6 Member States need to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006.

7 http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm

2.4. Continuation of debate on PPPs at EC level

This Communication does, however, not aim to conclude the debate on PPPs and Community law on public procurement and concessions. Experience with PPPs is steadily increasing. All players, including the national authorities and the Commission, are continuously learning from practical experiences with applying EC law to such partnerships. While this process should not prevent the Commission from taking initiatives to address any shortcomings of the existing legal framework perceived today, discussions between Commission departments and stakeholders involved in the development of PPPs need to continue at all levels and the planned impact assessment will attempt to take this continuing dialogue into account.[8]

These discussions will continue in existing Committees at Commission level, where public procurement experts[9] and Member States'[10] representatives[11] meet, through participation in conferences on PPPs and public procurement and by means of direct contacts between Commission officials and PPP experts. In addition, there appears to be a general consensus among national PPP Task Forces that infrastructure development could be further improved if the public sector had a more effective means of sharing existing experiences in PPP policy, programme development and project implementation. The Task Forces are therefore giving consideration, in association with the European Investment Bank, to establishing a European PPP Expertise Centre. The Commission would in principle welcome such an initiative.

3. CONCESSIONS

3.1. Background

A key feature of concessions is the right of the concessionaire to exploit the construction or service granted as a consideration for having erected the construction or delivered the service. The main difference to public procurement is the risk inherent in such exploitation which the concessionaire, usually providing the funding of at least parts of the relevant projects, has to bear. Such private capital involvement is considered to be one of the key incentives for public authorities to enter into PPPs. In spite of their practical importance, only few provisions of secondary Community legislation coordinate the award procedures for works concessions. For their part, the rules governing the award of service concessions apply only by reference to the principles resulting from Articles 43 and 49 of the EC Treaty, in particular the principles of transparency, equality of treatment, proportionality and mutual recognition. Against this background, the Green Paper (question 6) asked whether in the view of stakeholders a Community legislative initiative designed to regulate the procedure for awarding concessions was desirable.

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8 In this context, particular consideration should be given to questions relating to PPPs established to build and operate cross-border infrastructures.

9 Advisory Committee on the Opening-up of Public Procurement set up under Commission Decision 87/305/EEC.

10 In accordance with the arrangements for the interim period, the Committees not only include Member State representatives but also observers from the Acceding States (Bulgaria and Romania).

11 Advisory Committee for Public Works Contracts set up under Council Decision 71/306/EEC.

The great majority of stakeholders participating in the consultation confirmed the demand for greater legal certainty as regards the Community rules governing the award of concessions. Opinions on how to provide such legal certainty – via legislation or a non-binding, interpretative instrument – were, however, divided.

3.2. Options to provide legal certainty on concessions

The consultation showed the demand for a stable, consistent legal environment for the award of concessions at EU level, in particular to reduce transaction costs (by decreasing legal risks) and more generally to enhance competition. Many stakeholders argued that increasing legal certainty and effective competition in the area of concessions would be a practical way of promoting PPPs, thereby increasing the contribution that private project financing can make in times of tight public budgets. Private stakeholders particularly underlined that only EU level action could provide such legal certainty avoiding at the same time the problems posed by the patchwork of national legislation, especially with regard to the new Member States which need private finance most. There are basically two ways to meet this demand: (1) non-binding guidance, in particular in the form of an Interpretative Communication, and (2) legislation spelling out the obligations emanating from general EC Treaty principles.

Interpretative Communication

The Commission has already (in April 2000) adopted an Interpretative Communication on Concessions under Community Law which explains the scope and content of the EC Treaty principles applicable to the award of concessions. Many stakeholders argued that an Interpretative Communication was a quick and effective tool to provide clarification. However, comments made by key stakeholders in the course of the debate indicate that the existing Interpretative Communication on concessions has failed to spell out in a sufficiently clear manner the implications of EC Treaty principles for the award of concessions. Contributions from several important stakeholders were – surprisingly – still based on the assumption that existing EC law obligations do not require the award of concessions to be opened up to competition, in particular by enabling all undertakings to express their interest in obtaining concessions.

Other stakeholders considered an Interpretative Communication to be an ideal instrument to provide a clearer delimitation between public procurement contracts and concessions. However, the scope for certainty provided by an Interpretative Communication is limited, as it merely construes existing law. In many cases a lack of precision in the law can hardly be overcome by means of interpretation. It therefore seems likely that – while providing some added value – an update of the April 2000 Interpretative Communication on concessions would probably fall short of meeting the request for more legal certainty.

Legislative initiative

The reported misunderstandings regarding the scope and content of Community law obligations for contracting authorities who award concessions confirm the view of stakeholders that the general EC Treaty principles, even clarified by an interpretative document from the Commission, do not provide enough legal certainty. They are considered to leave too much discretion to contracting authorities and cannot therefore guarantee equal treatment of European companies throughout the EU. Indeed, both legal practice and doctrine show that – in spite of clarification provided by the European Court of Justice[12] – the requirements of the EC Treaty are understood in different ways. It was reported that this created particular difficulties for bidders bringing a case against the award of concessions for review by national courts. Clearly, this situation could discourage firms from bidding for concessions and might diminish competition for PPPs and ultimately jeopardise their success.

On a more general note, it is difficult to understand why service concessions which are often used for complex and high value projects are entirely excluded from EC secondary legislation. Some arguments explaining this lack of detailed award procedures at EC level have been submitted in the course of the PPP Green Paper consultation. They include the flexibility supposedly needed in the area of concessions and the subsidiarity principle. These arguments against a binding Community initiative in this area are, however, unconvincing: adopting Community legislation on the award of concessions does not imply that public authorities should lack flexibility when choosing a private partner for PPPs. A legislative initiative on the award of concessions needs to take the possible complexity of concessions and the need for negotiations between the contracting authority and the bidders into account. Against this background, it is difficult to see why spelling out the rules applicable to the award of concessions would *per se* unduly limit the flexibility of contracting authorities when awarding service concessions. Likewise, the precise content of such initiative should determine whether or not it is compliant or non-compliant with the subsidiarity principle. There is no reason to consider such an initiative *per se* as being non-compliant with this principle.

Having carefully considered all arguments and the factual information submitted in the course of the PPP Green Paper consultation, it would currently appear that a legislative initiative is the preferable option as regards concessions. However, as mentioned above, before formally proposing legislation further in-depth analysis will need to be undertaken in accordance with the principles of "Better Regulation", in order (1) to determine whether indeed a Community initiative to regulate procedures for awarding concessions is necessary, (2) if so, to shape such an initiative, and (3) to better understand its possible impact.

3.3. Content of a possible Community initiative on concessions

As explained above, the general principles derived from the EC Treaty may need to be clearly spelt out by means of Community legislation on the award of concessions. The legislation which should cover both works and service concessions would

[12] Case C-324/98 *Telaustria* [2000] ECR I-10475, Case C-231/03 *Coname* [2005] not yet published in the ECR.

provide a clear delineation between concessions and public procurement contracts. It would require adequate advertising of the intention to award a concession and fix the rules governing the selection of concessionaires on the basis of objective, non-discriminatory criteria. More generally, the rules should aim at applying the principle of equality of treatment of all participants to the award of concessions. Also, problems relating to the long duration of concessions, such as the need for their adaptation over time, as well as questions on PPPs established to build and operate cross-border infrastructures might be dealt with by such initiative.

One consequence of such legislation on concessions would be a qualitative leap in the protection of bidders in most of the Member States, as concessions, once they are covered by Community secondary legislation, would fall within the scope of the Community Directives on review procedures for the award of public procurement contracts, which provide for more effective and adequate remedies than the basic principles of jurisdictional protection developed by the European Court of Justice.

It is not possible to give details on the content of a potential Community initiative on concessions at this stage. The existence and shape of such rules depends on further research the Commission needs to undertake in the course of a full impact assessment. It is therefore premature to express an opinion on the overall scope of such rules, including the definition of threshold values above which such rules would apply. In any case, such initiative would not aim at amending existing sector-specific Community regulation covering the award of concessions in the respective sectors.

4. INSTITUTIONALISED PPPS

4.1. Preferred approach

The public consultation on the PPP Green Paper expressed the need to clarify how EC public procurement rules apply to the establishment of undertakings held jointly by both a public and a private partner in order to perform public services (institutionalised PPPs – IPPPs). Some stakeholders said that such clarification was needed as a matter of urgency. It was reported that public authorities abstain from entering into innovative IPPPs, in order to avoid the risk of establishing IPPPs which later on might turn out to be non-compliant with EC law. Only few stakeholders argued, however, that legal certainty in this area needed to be provided by means of a legally binding instrument.

At the moment, in the area of IPPPs it seems that an Interpretative Communication may be the best way to encourage effective competition and to provide legal certainty. First of all, in contrast to concessions, there has so far been no experience with an Interpretative Communication explaining how to apply public procurement rules to the establishment of IPPPs. Furthermore, in most Member States the establishment of public-private entities to perform services of general economic interest is a rather new, innovative concept. A non-binding initiative in this area would provide the required guidance without stifling innovation. In addition, a quick response to perceived uncertainties appears to be particularly important as regards IPPPs.

Overall, it appears at present that an Interpretative Communication would be better suited to this demand than fully-fledged legislation. However, should future analysis demonstrate that – as in the case of concessions – an Interpretative Communication is insufficient to safeguard the proper application of EC law, the adoption of a legislative proposal remains an option.

4.2. Content of a possible Interpretative Communication on institutionalised PPPs

An Interpretative Communication on IPPPs and Community public procurement law should, above all, clarify the application of public procurement rules (1) to the establishment of mixed capital entities the objective of which is to perform services of general (economic) interest and (2) to the participation of private firms in existing public companies which perform such tasks. In this context, any future Communication should in particular outline ways of establishing IPPPs ensuring that the accompanying award of tasks is EC law compatible.[13]

In the context of IPPPs the PPP Green Paper discussed in-house relations.[14] It was stressed that as a rule Community law on public contracts and concessions applies when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it. It is established case law[15] of the European Court of Justice that the position can be otherwise only where (1) the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, (2) that person carries out the essential part of its activities with the controlling local authority or authorities. In its judgment of 11 January 2005 in the *Stadt Halle*[16] case, the European Court of Justice supplemented this definition of "in-house relations" by stating that the public award procedures laid down by the Public Procurement Directives must – if the other conditions for their application are met – always be applied where a contracting authority intends to conclude a contract for pecuniary interest with a company legally distinct from it, in whose capital it has a holding together with at least one private undertaking.

In particular, public sector stakeholders, including some Member State governments, called for a widening of the in-house concept, which in their view is understood too narrowly by the Court. However, there does not appear to be any compelling evidence at present to suggest that the quality of public services could be improved or prices be reduced, if private undertakings – via IPPPs – obtain public service missions without a preceding competitive award procedure. Furthermore, it is difficult to see how privileged treatment of IPPPs vis-à-vis their private competitors could comply with the equal treatment obligation derived from the EC Treaty.

Contributions to the PPP Green Paper and discussions with stakeholders in the context of this public consultation as well as experiences in the context of Article 226 EC Treaty procedures have shown that clarification is also needed in order to identify to what extent Community law applies to the delegation of tasks to

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13 Such Communication would more specifically examine closely the issues highlighted in paragraphs 58 to 69 of the PPP Green Paper.

14 Paragraph 63 of the PPP Green Paper.

15 Judgment of 18 November 1999 in Case C-107/98 *Teckal* [1999] ECR I-08121, paragraph 50.

16 Case C-26/03 [2005], paragraph 52, not yet published in the ECR.

public bodies, and which forms of co-operation remain outside the scope of internal market provisions. Just recently, the European Court of Justice[17] made it clear that relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law could not *a priori* be excluded from public procurement law. Clearly, further clarification on this issue could form part of an Interpretative Communication on IPPPs.

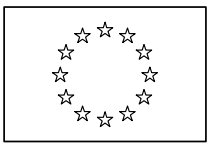
5. NEXT STEPS

Further analysis needs to be undertaken on the measures discussed in the present Communication, in particular the legislative instrument on concessions and the interpretative document on IPPPs. Focused stakeholder consultation will be part of this work.

It is envisaged to prepare the interpretative document on IPPPs in the course of 2006.

In 2006, the Commission services will also conduct an in-depth analysis of the impacts of a possible legislative initiative on concessions. The final decision whether or not to take this measure, and on its concrete shape, depends on the result of this impact assessment.

[17] Judgment of 13 January 2005 in Case C-84/03 *Commission vs Spain* [2005] not yet published in the ECR.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.5.2005
SEC(2005) 629

COMMISSION STAFF WORKING PAPER

REPORT ON THE PUBLIC CONSULTATION ON THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

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1. INTRODUCTION

On 30 April 2004 the Commission adopted the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions[1] (the PPP Green Paper). The aim of the PPP Green Paper was to launch a debate to find out whether the Community needs to intervene to give economic operators in the Member States better access to the various forms of public private partnership under conditions of legal certainty and effective competition. It therefore describes how the rules and principles deriving from Community law on public contracts and concessions apply when a private partner is being selected, and for the duration of the contract, for different types of PPP. The Green Paper also asks a set of questions about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suited to the requirements and features of PPPs. The Commission invited all interested parties to send their comments on the 22 questions either by mail or by electronic mail by 30 July 2004.

In line with the Commission's general principles and standards for consulting interested parties,[2] this report analyses the contributions received from Member States, public authorities, European and national associations, public and private enterprises and individuals.

The objective of the report is to reflect the ideas, opinions and suggestions made. It tries to identify, as objectively as possible, the main trends, views and concerns set out in the contributions. In addition, for the sake of transparency, all contributions sent electronically and with no objection to their publication have been published in full on the website of the Directorate-General for the Internal Market and Services (DG MARKT).[3]

The report is structured as follows: this introduction (1) is followed by some general observations on the consultation (2), an executive summary (3), and the detailed analysis of the comments received (4). The structure of the detailed analysis follows the order of the questions set out in the PPP Green Paper. Due to the particularly technical nature of the comments on question 1 ("What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision [legislative or other] in your country?") and question 21 ("Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of 'good practice' in this framework which could serve as a model for the Union? If so, please elaborate.") they have not been included in this report, but will be analysed at a later stage on the DG MARKT website.

It did not appear desirable to indicate the exact number of "votes" of stakeholders in favour or against one or the other position. On the one hand contributions were not always easily and on all issues attributable to one or the other position. On the other

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1 COM(2004) 327, 30.4.2004.

2 Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, COM(2002) 704, 11.12.2002.

3 http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm.

hand the indication of exact numbers could even be misleading, as some enterprises from the same sector and sharing the same interest submitted each a nearly identical position, rather than sending just one coordinated contribution via their association as most other enterprises did. Questions on how to count such contributions do not need to be accentuated if only general trends are indicated.

The report does not aim to draw political conclusions from the consultation process as such. The Commission intends to present its conclusions in the second half of 2005.

2. GENERAL OBSERVATIONS ON THE CONSULTATION

In total the Commission received 195 replies to the list of questions set out in the PPP Green Paper. Governments or individual ministries from Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and the United Kingdom, 15 other public authorities from these Member States, 111 associations with private and/or public entities as their members, 38 enterprises and 13 individuals contributed in writing to the consultation. No contribution – either from State authorities or from private entities – was received from Cyprus, Estonia, Greece, Hungary, Latvia, Luxemburg, Malta or Slovenia. The strong representation of contributions from Germany, France, UK, Austria and Italy is notable. A large number of European associations contributed to the significant overall participation of stakeholders in this consultation.

Both the European Economic and Social Committee[4] and the Committee of the Regions[5] adopted opinions on the PPP Green Paper. The European Parliament has not yet given an opinion on the PPP Green Paper.

The Commission also received 3 300 standard letters or short notes from individuals, mostly of German origin. These letters expressed concern about any move to liberalise the provision of water.

3. EXECUTIVE SUMMARY

3.1. Horizontal PPP initiative

A slight majority of contributors are explicitly opposed to a horizontal PPP initiative at Community level. In contrast to this, **many stakeholders express support for a horizontal PPP initiative**, be it in the form of a binding or a non-binding instrument. Such an initiative is proposed to cover at least the following issues: generally applicable procedural rules, a clear definition of PPPs, general principles and compulsory advance publication of invitations to tender.

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4 Opinion on the Green Paper on public-private partnerships and Community law on public contracts and concessions, Brussels, 27-28 October 2004, CESE 1440/2004.

5 Opinion of the Committee of the Regions of 17 November 2004 on the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), ECOS-037.

3.2. Selection of the private partner

Many contributors consider that the transposition of the new procurement procedure known as **competitive dialogue** into national law will provide interested parties with a procedure which is particularly well suited to awarding contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. However, a large majority of stakeholders point to practical problems with applying this procedure and ask the Commission to provide clarification.

In spite of the positive overall perception of the existing Community legal framework, **a clear majority** of stakeholders **favour some sort of Community initiative in the area of concessions,** clarifying definitions and core principles of the award procedure. The number of stakeholders in favour of legislation on this issue approximately equals the number of stakeholders in favour of some sort of guidelines on the rules applicable to awarding concessions.

The great **majority** of stakeholders **believe** that **non-national operators are guaranteed access to private initiative PPP schemes** and that advertising is adequate to inform all interested operators about such schemes. A large number of stakeholders, however, argue in favour of **some sort of encouragement for private initiative PPPs**.

3.3. The contractual framework for PPPs

Few stakeholders report conditions of execution having a discriminatory effect or forming an unjustified barrier to the freedom to provide services or the freedom of establishment. Not many more contributors cite **examples of discriminatory effects of practices for evaluating tenders**. Consequently, the **great majority** of contributors **do not support an EC initiative on the contractual framework for PPPs**.

3.4. Subcontracting

A **significant majority** of stakeholders **do not perceive problems in relation to subcontracting** and **argue against new initiatives in this area.** Conversely, a large number of contributions report problems in relation to subcontracting, including the reduced control public authorities exercise over subcontractors, the difficult position subcontractors have vis-à-vis the main contractors and uncertainties as to which EC rules apply.

3.5. Institutionalised PPPs

There is no agreement on **whether or not Community law on public contracts and concessions is actually complied with** when undertakings are set up jointly by public and private companies to carry out infrastructure projects or to perform public services (institutionalised PPPs – IPPPs). A substantial number of contributions deplore the **lack of legal certainty at EC level** regarding relations between contracting authorities and other parties which are so close that they are treated as relations between entities not legally distinct from each other ("**in-house relations**").

A **clear majority of contributions argue in favour of taking the initiative at Community level** to clarify or define the obligations of contracting bodies regarding the conditions for a call for competition between operators potentially interested in an institutionalised project. A majority of those contributions that favour a Community initiative would prefer the Commission – at least as a first step – to provide guidelines or some other form of clarification on the application of existing public procurement rules to the establishment of IPPPs. Other contributors who favour a Community initiative argue that legislative measures at EC level would be the appropriate response to perceived difficulties in this area.

3.6. Perceived barriers to the introduction of PPPs

Various stakeholders consider the **existence of too many and too strict rules to be an obstacle** to the development of PPPs. In particular, contributors from the public side, but also various private undertakings and associations, complain that EC, national and local rules applicable to PPPs limit the flexibility needed to set up such projects. Another major issue which many stakeholders suspect impedes the development of PPPs concerns EU co-financing under EC regional policy.

3.7. Collective consideration

Stakeholders express **nearly unanimous support for a collective consideration of PPP issues at EC level**. According to a large number of contributions the objective of such collective consideration should be to exchange best practice. To this end the majority of contributions argue in favour of establishing a European PPP agency, a centre of excellence/resources and documentation centre or an observatory. Most of the contributors to the consultation expect the Commission to take such an initiative.

Views of stakeholders on key topics	
• **Horizontal PPP Initiative**	**Slight majority** explicitly **opposed** to a horizontal PPP initiative at EC level.
• **Concessions**	**Clear majority in favour** of an EC initiative on the award of concessions, clarifying definitions and applicable Community rules. **No consensus** on the form of such an initiative.
• **Institutionalised PPPs**	**Clear majority in favour** of an EC initiative on institutionalised PPPs clarifying applicable Community rules and the scope of the in-house exemption. **No consensus** on the form of such an initiative.

4. THE MAIN RESULTS OF THE PUBLIC CONSULTATION

4.1. The suitability of the Competitive Dialogue procedure for the selection of private partners for PPPs

Question 2 of the PPP Green Paper

Question
In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?
Main views of stakeholders • **Many contributors consider the Competitive Dialogue to be well adapted to the award of contracts designated as public contracts.** • **A large majority of stakeholders report problems with applying the procedure in practice, in particular as regards its scope, its complexity, its cost implications and the need to keep intellectual property confidential.** • **Most of the contributors ask the Commission to provide clarification on various aspects of the Competitive Dialogue.**

4.1.1. Scope of Competitive Dialogue

Some contributors argue for a limitation, some for an extension of the scope of application of the Competitive Dialogue procedure. A considerable number of contributors stress that the procedure does not apply to awarding service concessions; a few others say that it is not applicable to PPPs, including institutionalised PPPs, either. The reason most often given is that the Competitive Dialogue is not flexible enough. Conversely, one stakeholder considers the Competitive Dialogue to be particularly well suited to PPPs which are not complex, while two participants in the consultation specifically ask for the Competitive Dialogue to be applied to setting up institutionalised PPPs.

Many contributors are uncertain about the scope of the Competitive Dialogue; some miss a clear delineation of the boundary between this procedure and the negotiated procedure. One law firm considers that the contracting authority enjoys too much discretion in interpreting the criteria which determine whether the Competitive Dialogue applies.

4.1.2. Concerns about protection of confidentiality

The majority of the contributors express concern that participants in the Competitive Dialogue could potentially gain access to confidential data. These contributors point out that under Article 29(6), first subparagraph, of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, contracting authorities shall ask the participants to the dialogue to submit their final tenders on

the basis of the solution or solutions presented and specified during the dialogue. It is claimed that this might lead to the unauthorized transfer of intellectual property, including innovative ideas, from one bidder to his or her competitors. The perceived consequences of this practice include a loss of improvements to public services and of benefits through innovation. Many of the contributors are also concerned that contracting authorities might unduly profit from know-how; unsuccessful bidders are not compensated.

4.1.3. Perceived lack of flexibility of Competitive Dialogue

Various contributors appreciate the structure of the Competitive Dialogue, in particular the fact that a procedure in stages has been introduced and that all aspects of the project are potentially open to discussion in the course of the first stage. One contributor expects that the introduction of the Competitive Dialogue will increase the number of PPPs set up in his country of origin.

Conversely, many contributors complain that the Competitive Dialogue does not provide the degree of flexibility required to negotiate large, complex projects. The Competitive dialogue is perceived as a particularly costly procedure for bidders. Some stakeholders see the cost as being so high as to impede fair competition, as only a small number of competitors – excluding SMEs – can afford it.

In this context, contributors are particularly concerned about the provision in the second subparagraph of Article 29(6) of Directive 2004/18/EC that tenders may – subsequent to their submission as "final" – (only) be clarified, specified and fine-tuned, without changes to their basic features. This might require bidders to finalise many details of the bid before submitting it as the final tender, thus before the respective bidder can be certain of winning the contract. Under the Competitive Dialogue procedure, losing bidders would therefore incur the full cost of employing advisers to negotiate almost fully the terms of a complicated contract to the stage at which it can be signed. Issues such as staff transfer and preparation of the financial and legal documentation would also have to be decided before submission of the final tender, which entails considerable investment for bidders. Another argument against working out the full proposal before being sure of winning the contract is – according to various contributions – that banks are reluctant to carry out a full due diligence exercise until their client has secured the contract.

Against this background, the respective contributors stress the need to grant bidders scope to modify the final tender after the contract is awarded. If the Competitive Dialogue does not allow that flexibility, it cannot – according to these stakeholders – be considered well suited to complex PPPs and this might discourage prospective bidders from participating in such procedures. One stakeholder adds that "clarifications" made after the selection of the preferred bidder need to be made transparent, in order to avoid abuse. Another warns against allowing solutions which deviate from the essential requirements of the invitation to tender.

In order to reduce the cost of the Competitive Dialogue, a number of stakeholders argue in favour of keeping the procedure as short and effective as possible. To this end, two contributors contend that public administrations need to clearly disclose their needs at the outset of the procedure, to impose reasonable deadlines for the

different stages of the procedure and to limit the number of candidates for the phase after the dialogue to two.

While certain stakeholders consider that contracting authorities need to be able to define the technical specifications in a way that secures the comparability of bids, others recognise that it is difficult for contracting authorities to specify all their needs and requirements in the initial contract notice, as they will most probably become aware of other needs and requirements in the course of the dialogue. More generally, several contributors expect that contracting authorities will tend to leave the definition of the requirements of the project to private operators and thereby gradually lose the ability to administer large projects. In this context, one contributor stresses that bidders might be deterred from participating in a procurement procedure if contracting authorities give the impression of opening a procurement procedure without really knowing what they want.

4.1.4. Plea for compensation of non-successful bidders

Many stakeholders argue in favour of a mechanism to compensate bidders who made it to the last round without ultimately being selected. These stakeholders contend that there is otherwise little incentive for potential bidders to develop (costly) technical innovations at the risk of their being disclosed to competitors. One stakeholder from the public sector argues that a requirement to compensate unsuccessful bidders would make the Competitive Dialogue less attractive for small and medium-sized public authorities.

4.1.5. Guidance on applying the Competitive Dialogue is needed

A substantial number of stakeholders argue in favour of adopting a guidance paper on the application of the Competitive Dialogue. One issue which contributors consider worth clarifying is whether the submission of final tenders referred to in Article 29(6) of Directive 2004/18/EC should be based on the solutions presented individually by each bidder – which is, for reasons of confidentiality, explicitly preferred by some contributors – or on a solution proposed by one bidder – which is preferred by those who advocate the comparability of the proposals, in order to ensure equal treatment of bidders. In the view of various contributors, other issues requiring clarification include the scope of the Competitive Dialogue, the need to compensate unsuccessful bidders, the need to continue with the Competitive Dialogue even if, after the procedure has started, it turns out that the project in question qualifies as a concession, the extent of the protection of confidentiality, and certain terms set out in Article 29 of Directive 2004/18/EC, such as "economically most advantageous offer" and "basic features of the tender".

4.1.6. Views on the application of the negotiated procedure

In requesting flexible application of the rules governing the Competitive Dialogue, various contributors criticise the Commission for interpreting the scope of the negotiated procedure too restrictively. The Commission's position is thought not to deliver benefits in terms of transparency, openness or minimising barriers to trade. Easier recourse to the negotiated procedure is – according to various contributors – necessary, as the assignment of economic and legal risks linked to PPP models requires intensive negotiation during all phases of the procedure. Along these lines,

many stakeholders question the need for the Competitive Dialogue, which is thought not to provide any added value compared to the negotiated procedure.

4.2. The selection of private partners for contractual partnerships

4.2.1. Problems related to contractual PPPs in terms of Community law on public contracts

Question 3 of the PPP Green Paper

Question *In the case of such contracts* [meant are the purely contractual PPPs mentioned in Question 2]*, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.*
Main views of stakeholders • **The main points considered to pose problems in terms of Community law on public contracts include the difficulty of distinguishing between the various types of public contracts and concessions and the related uncertainty as to the appropriate public procurement procedure.**

Various stakeholders point to the difficulty of distinguishing clearly between the various types of public contracts and concessions under EC public procurement law, and the related uncertainty as to the choice of the appropriate public procurement procedure, as key problems of current PPP practice.

Some contributions raise the problem of accuracy: inaccurate bids might unfairly favour certain bidders. Two situations are cited. One is where participants in PPP procurement procedures calculate their bids improperly. In many cases this wins them the contract, but subsequently requires a renegotiation of the terms. Stakeholders raising this problem argue that "creditworthiness" should be an important selection criterion, to ensure that private partners are able to stick to the price they initially offered. The other situation is where (over-) optimistic assumptions are made about certain factual developments, so that the price initially indicated by the respective operator is lower than that of his competitors. Again, if such assumptions turn out to be incorrect in the course of the performance of the contract, it must be renegotiated – and the public authority and competitors have lost out. One stakeholder cites estimates of the frequency of traffic in a given area affecting the profitability of a motorway as an example. To avoid such problems, it is proposed that contracting authorities provide reference estimates for factual developments relevant to the PPP.

Another point which two contributors raise is the de facto exclusion of SMEs from the bidding process for PPPs. The more contracting authorities combine individual small or medium-sized projects into single large projects, the more difficult it is for SMEs to win such contracts or concessions. The Competitive Dialogue,[6] with its financial ramifications for bidders, is specifically mentioned as being disadvantageous to SMEs in this respect.

[6] Article 29 of Directive 2004/18/EC.

An issue raised by a substantial number of stakeholders in the context of the procurement procedure for PPPs is the change of bidding groups (i.e. consortia established for the purpose of PPP award procedures, often in the form of so-called Special Purpose Vehicles – SPVs) in the course of the procurement procedure. These stakeholders favour flexibility in this area and ask for clarification of the law at EC level.

One stakeholder refers to legal uncertainties regarding the participation of consultancies in public procurement procedures, in the event that they assisted the public side in preparing such procedures. Another stakeholder complains that contracting authorities regularly ask just one consultancy for advice on preparing procurement procedures. It is argued that this situation leads to a degree of standardisation of invitations to tender which is considered detrimental to innovation and competition. In the view of this stakeholder, assisting public authorities in preparing invitations to tender should in any case be a publicly procured service as well.

Other contributors are of the opinion that contracting authorities should embark on a real dialogue with bidders, which includes providing proper answers to questions put by bidders in the course of the procedure. One contributor argues that when contracting authorities decide to withdraw an invitation to tender they need to give good, clear reasons for this decision.

4.2.2. The need for legislative initiatives at EC level on the award of concessions

4.2.2.1. Practical experience with award procedures for concessions

Questions 4 and 5 of the PPP Green Paper

Question *Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?* *Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?*
Main views of stakeholders • **Many stakeholders contend that the Community legal framework is sufficiently detailed in the sense of question 5.** • **Problems encountered in the course of award procedures for concessions include a lack of legal certainty, in particular as regards deciding whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.**

While many stakeholders consider the Community legal framework sufficiently detailed to allow non-national companies to participate effectively in procedures for awarding concessions, and a substantial number of contributions describe their

practical experience in this field as positive, various other contributors point to problems encountered. These problems include a lack of legal certainty due to non-standardised public procurement procedures, confusion about which EU rules apply, in particular whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.

In the view of many contributors, the perceived competitive advantages of national companies are not necessarily due to discriminatory national rules, but rather result from the facts on the ground, such as national companies' better knowledge of specific local conditions, including the national legal provisions, and language problems. Many contributors explain that large international companies make up for such disadvantages by establishing national subsidiaries.

4.2.2.2. General support for an EC initiative on concessions

Questions 6 and 7 of the PPP Green Paper

Question *In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?* *More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?*
Main views of stakeholders • **A clear majority of stakeholders favour a Community initiative in the area of concessions. Views are divided on the form of such an initiative.** • **A Community initiative in this area should, above all, provide more clarity as regards the award procedure. However, there is broad agreement that public contracts or concessions should not be subject to identical award arrangements.** • **A key argument against any initiative on concessions is the perceived need for flexibility in award procedures.** • **Many stakeholders are in favour, but a slight majority are against a horizontal PPP initiative.**

General views on the necessity and possible shape of an EC initiative on concessions

A clear majority of stakeholders are in favour of a Community initiative on concessions. Overall, the number of stakeholders in favour of legislation approximately equals the number of stakeholders in favour of some sort of guidelines on the rules applying to procedures for awarding concessions. A majority of contributors, however, do not see any objective grounds for new legislative action to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements.

Views in favour of a guidance document on the award of concessions

A large number of contributors say that guidance on concessions should primarily focus on the definition of concessions, clearly delineating these arrangements from public contracts. This initiative should, in particular, clarify which and to what extent risks have to be assigned to the private partner, to justify treating the respective arrangement as a concession. Clarification is also requested on how to apply the basic EC Treaty principles, in particular transparency, when awarding concessions.

Other contributors argue that the new Public Procurement Directives[7] have just been adopted, but not yet implemented by the Member States. Until those Directives are fully implemented, they consider any Community initiative going beyond a guidance document to be premature. They argue that before tackling such a binding Community initiative, the Commission should update its Interpretative Communication on Concessions under Community Law[8] of April 2000, on the basis of experience gained in this area. Another contributor favours a guidance document and questions whether detailed EC legislation is appropriate to change anti-competitive behaviour by public authorities.

One contributor submits that an initiative on concessions should consist in exchanging best practice, rather than drafting rigid legislation.

A considerable number of stakeholders advocate a non-legislative initiative at Community level to provide more clarity on public procurement issues in relation to PPPs in general. One suggestion is to present the different types of PPPs and explain which public procurement procedure is best suited to each of these types. Other demands for clarification cover the definition of PPPs, including the distinction between works concessions and works contracts, and the formulation of general principles applicable to tendering for PPPs. As regards the difficulty of deciding at the outset whether the contract is a public contract or a concession[9], one contributor suggests that, where there is any doubt, the transaction should be treated as a service contract if there is a reasonable chance that it will be so defined later on. Another contributor recommends sticking to the initial qualification even if – in the course of the procedure – it turns out to be inappropriate.

Considerable support for legislation on the EC concession award regime

Most of the stakeholders who argue in favour of a legislative initiative cite the need for legal certainty at EC level for the award of concessions. Uncertain rules are said to impede the protection of private investment and increase consulting and legal advice costs for undertakings. Other stakeholders contend that the provision of a common set of EC rules on this subject would create a level playing field for all competitors, thereby safeguarding the Internal Market, and eventually enhance (transnational) competition and cross-border tendering. A group of contributors say that the general EC Treaty principles do not provide enough legal certainty: they

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7 Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p.1) and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p.114).

8 OJ C 121, 29.4.2000, p.2.

9 Point 34 of the Green Paper.

leave too much discretion to contracting authorities and cannot therefore guarantee equal treatment of European companies throughout the EU.

Another key argument in favour of EC legislation is the need to increase transparency. According to one contributor, most problems with PPPs concern the choice of the private partner and consequently one risk to such projects would be reduced if specific PPP public procurement rules at EC level were introduced. In addition, the fact that major concessions in water supply or toll roads are not subject to strict procurement rules is seen as a serious anomaly of EC public procurement law.

As to the content of a legislative EC initiative on concessions, some contributors say that it should at least clearly define the various types of concessions and provide a legal framework for the award procedure for concessions. Some contributions submit that a legislative initiative on concessions should be part of a general legislative initiative on PPPs, which should cover the obligation to open a competitive procedure for the award of a contract, including its proper publication, the definition of "in-house" and the guarantee of equal access to subsidies. The analysis of the large number of contributions from stakeholders who are in favour of a legislative Community initiative on PPPs in principle shows, however, that few are actually in favour of aligning the procedures for contracts and concessions.

On the form of possible legislation, one stakeholder says that a legislative PPP initiative should merely consist in amending Directive 2004/18/EC, rather than "inventing" an entirely new initiative. According to various stakeholders, any EC initiative on the award of concessions should leave sufficient flexibility for projects to evolve into different structures and allow for fundamental differences between projects in different industry sectors. Other stakeholders stress that national experience needs to be analysed carefully before any legislation is drafted in this area.

Many stakeholders are in favour but a slight majority of stakeholders are against a horizontal PPP initiative

Many stakeholders express support for a horizontal PPP initiative, be it in the form of a binding or a non-binding instrument. Such an initiative is proposed to cover at least the following issues: generally applicable procedural rules, a clear definition of PPPs, general principles and compulsory advance publication of invitations to tender. The reasons given for such a horizontal initiative include the need to increase legal certainty, make procedures transparent, save time and money and more generally to encourage competition.

Many contributors are explicitly opposed to such an initiative. They argue that PPPs and public contracts are too different from each other to be subject to the same rules, that setting up PPPs remains a matter for the Member States, that overregulation impedes rather than promotes PPPs and that there has not been thorough analysis nor sufficient experience, in particular with the implementation of the new Public Procurement Directives. Stakeholders supporting these arguments refer, however, to the possibility of revisiting this question once sufficient analysis and experience has been built up.

Views against any EC initiative on concessions

Many contributors opposing any EC initiative on concessions argue that concessions are a special case. They say that such arrangements assign considerable risks to the private party in terms of services of general economic interest. Public authorities awarding concessions therefore need to have full confidence in their private partner. Against this background, they find it difficult to choose the right partner on the basis of a formal procurement procedure and more particularly on the basis of economic criteria.

In this context, some contributors say that when adopting the new Public Procurement Directives the EC legislator explicitly excluded concessions (partly as regards works concessions; entirely as regards service concessions) from the scope of these Directives. There is – according to these contributors – no new evidence to challenge that decision. In addition, many contributors invoke the subsidiarity principle as an argument against a legislative initiative on concessions; several others say the application of the EC Treaty principles is sufficient to ensure competition in this area.

Some of the contributors opposing a new Community initiative on concessions express concern that overregulation, in particular introducing rigid procedures, leads to high procedural costs and a loss of the flexibility needed to negotiate concessions, that it impedes the innovative development of PPPs and generally discourages private operators from entering into PPPs. In addition, many of those contributors who are opposed to aligning award arrangements for public contracts and concessions consider it impossible to define a single procurement concept to suit all PPPs. It is stressed several times that concessions and public contracts are quite different concepts.

Two contributions from the public side say that the award of concessions on the basis of competitive procedures would lead to a "win or die" situation for small public companies which have been specifically established to perform services of general economic interest. If such undertakings lose a competition they may not be able to participate in competitions outside their geographical area of competence – due to national legal restrictions, but also due to their specific competence – whereas large international enterprises could – according to this opinion – more easily withstand failure to obtain one or more small or medium-sized local service concessions. Consequently, according to these stakeholders, submitting the award of public services to competitive tendering procedures leads in the long run to the disappearance of small and medium public enterprises and thus contributes to a non-reversible "oligopolisation" of the market.

4.3. Private initiative PPPs

4.3.1. Accessibility of private initiative PPP schemes to non-national operators

Question 8 of the PPP Green Paper

Question *In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?*
Main views of stakeholders • **Broad agreement exists that non-national operators are guaranteed access to private initiative PPP schemes and that adequate advertising is provided to inform all interested operators about such schemes.**

A large majority of stakeholders believe that non-national operators are guaranteed access to private initiative PPP schemes and that adequate advertising is provided to inform all interested operators about such schemes. Some contributors argue that the problem of access to private initiatives for non-national operators is not a real one, as normally non-national operators are not interested in such projects: two contributors explain that usually enterprises operate abroad through local subsidiaries. Some contributors claim that private initiative projects are extremely rare in the water sector. One large association contends that there are no examples of private PPP initiatives in Germany.

On a more general note, some contributors say that private initiative PPPs tend to be less rigorously scrutinised and are not subject to the same degree of competition as ordinary tenders, which they say favours corruption and causes high costs.

4.3.2. Proposals on the best formula to encourage private initiative PPPs in the European Union

Question 9 of the PPP Green Paper

Question *In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?*
Main views of stakeholders • **There is no agreement on the need to encourage private initiative PPPs.** • **Those stakeholders who favour such encouragement advocate financial incentives or the granting of a "right of first refusal" to those who launch private initiatives.**

A large number of stakeholders recognise the need for some sort of encouragement for private initiative PPPs; most of them present ideas. Conversely, a substantial number of contributors explain that the application of existing EC rules, in particular the EC Treaty principles, provides sufficient encouragement for operators to embark on private initiative PPPs. Many stakeholders acknowledge that any measure

encouraging private initiative PPPs needs to strike a balance: motivating operators to invest in such initiatives, while not distorting fair competition. Some stakeholders believe, however, that encouraging private initiative PPPs necessarily conflicts with the principles of transparency and equal treatment.

The majority of those contributors who express themselves in favour of some sort of encouragement for private initiative PPPs consider financial compensation as the appropriate instrument to promote such initiatives, in particular as this incentive appears to be the least damaging to competition. Some argue that such financial compensation should only be granted if, at the end of the procurement procedure launched subsequent to the private initiative, the operator concerned does not obtain the contract or the concession. Such compensation should at least cover the development costs of the project.

A substantial number of contributors consider granting a "right of first refusal" as the most pertinent way of encouraging private initiative PPPs. This would require the contracting authority to offer the contract or concession first to the private initiator. Several contributors add that if the initiator does not take up the offer, he should be granted financial compensation for his work. Other stakeholders argue that granting the "right of first refusal", rather than financial compensation, renders private initiatives more attractive as operators usually initiate PPPs in order to obtain a PPP contract or concession. Other advantages proposed by various contributors include setting relatively short time limits for competitors to respond to the tender, granting the private initiator an exclusive right to a negotiated procedure and introducing a fast-track process to deal with litigation initiated by competitors of the first mover, if the latter wins the contract. According to a large number of contributions the protection of the initiator's intellectual property is a key issue in promoting private PPP initiatives. One contributor suggests awarding part of the overall PPP contract/concession directly to the private initiator. Another stakeholder deplores the fact that most of the really innovative proposals come from medium-sized companies, who – due to their structure – have hardly any chance of winning a PPP competition.

Other contributors express the opinion that tackling overregulation and amending existing national stipulations which impede private initiatives would substantially encourage them. In this context, two contributors cite existing national provisions which exclude from the tendering procedure companies that have – however indirectly – contributed to preparing the specifications of the invitation for tender. One stakeholder draws a parallel between a private PPP initiator and an operator who assists the respective contracting authority in drawing up the specifications for a tendering procedure.

A substantial number of stakeholders explicitly refer to the Italian *Merloni Law*[10] as an example of a specific procedure for unsolicited PPP proposals. The incentive of giving the private initiator the "right of first refusal" and the right to have his costs repaid if the project is awarded to a competitor are considered to be key elements of this Italian law. Another concrete proposal to encourage private initiative PPPs is to

[10] Framework law No 109/94 (G.U. No 41, 19.2.1992) modified by Law No 166/2002 (G.U. No 181, 3.8.2002).

launch a formal public procurement procedure based on a private initiative proposal and to exclude the initiating private party from the procedure. If no better solution comes up in the course of the procurement procedure, the contract should be awarded to the initiating party. If a better solution than the initial proposal comes up, the initiating party should be compensated.

Referring to the trade-off between providing incentives for private initiative PPPs and encouraging competition, one contributor suggests that – subsequent to a private PPP initiative – public authorities should be entitled to award the contract to the private initiator without launching a formal procurement procedure if they expect that – due to the intellectual property rights of the private initiator – competition would produce limited benefits only; conversely, if greater benefits could be expected from competition, a proper public procurement procedure should be carried out.

One stakeholder argues that PPPs should in any case be initiated by the public side and follow a regular public procurement procedure. If the contracting authority is interested in exploring the interest of private parties in the envisaged PPP or in obtaining ideas on alternative solutions for a project before formulating the technical annex to the invitation for tenders, it can undertake "market research" or hold an "ideas competition", which follows precise rules to ensure adequate transparency and equal treatment.

As regards the method of promoting private initiatives, various contributors are opposed to the legislative route. Some fear that new legislation might constrain the establishment of PPPs. Conversely, a substantial number of stakeholders prefer PPP legislation or at least guidance on this issue. In addition to encouraging private initiatives, the legal framework would have to ensure transparency, non-discrimination and equal treatment. Other instruments to promote private initiative PPP schemes mentioned in the consultation included the provision of guidance, the exchange of best practice and the creation of a task force on this subject at EC level.

Some stakeholders argue that private initiative PPPs are attractive enough under existing rules, citing the Competitive Dialogue procedure as particularly suited to encouraging innovative thinking. The know-how acquired in the course of preparing the initiative puts the private initiator in an advantageous position vis-à-vis his competitors. Thus, any additional advantage granted to the respective operator could seriously distort competition. Along these lines, a number of stakeholders argue that the competitive advantage of operators initiating a PPP needs to be "neutralised", for example by making the studies and analysis done by the operator available to competitors.

4.4. The contractual framework for PPPs

4.4.1. Experience with and recommendations for the phase following the selection of private partners

Question 10 of the PPP Green Paper

In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

Various contributions stress that contracting authorities must prepare the contract well, in order to avoid problems in the phase following the selection of the private partner. The scope of the project, the performance expected from the private contractor and the clauses on adaptation over time should in particular be precisely defined. One stakeholder cites cases in which risk could not be clearly allocated to the private partner because the technical and organisational framework was not clear enough. Another recommends defining precisely the condition in which state property used by the PPP contractor has to be returned. Otherwise, bidders that do not maintain such property properly can offer lower prices than their competitors.

One public body cites negative experiences following selection of the private partner, including the insolvency of the private party, price increases for the services performed by the partner and an oligopolisation of the relevant market. One Member State Government cites good experiences following the award of the project when both the construction and maintenance of a building were contracted to one and the same company.

One stakeholder considers regular reviews of the PPP contract essential.

4.4.2. Conditions of execution – not considered to exhibit discriminatory effects

Question 11 of the PPP Green Paper

Question *Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or the freedom of establishment? If so, can you describe the type of problems encountered?*
Main views of stakeholders • **Few stakeholders are aware of cases where the conditions of execution – including the clauses on adjustments over time – had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment.** • **There is broad consensus that the duration of the contract is not a source of discrimination in current PPP practice and that adjustments to long-term PPPs over time are needed.** • **Those contributors who perceive discriminatory effects complain in particular about the different treatment of public and private companies.**

4.4.2.1. General remarks

Few stakeholders are aware of cases where the conditions of execution – including the clauses on adjustments over time – have had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment. Those contributors who perceive discriminatory effects complain in particular about the different treatment of public and private companies (preferential tax treatment and the lack of insolvency risk of public undertakings). One stakeholder cites "evergreen" clauses (i.e. requiring the private contractor to keep the technical standard of a project at the state of the art) and automatic renewal clauses as problematic.

4.4.2.2. Duration of PPPs

The general perception of contributors is that the term of the contract is not a source of discrimination in current PPP practice, as long as it is clearly spelt out in the descriptive documents. Various stakeholders contend that an extension of the contract which is not provided for in the initial contract requires a new public procurement procedure.

Several contributors comment on the statement in the PPP Green Paper that the duration of the partner relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is recouped and there is a reasonable return on invested capital.[11] It is argued that the term of the contract should be principally determined by the life of the infrastructure assets, rather than by the amortisation of a project. Other issues to be considered when deciding on a reasonable term for a PPP are – according to some stakeholders – technical continuity, security of supply, optimisation of maintenance and renovation of infrastructure. It is also contended that training personnel requires a certain length of time, to enable the private contractor to fully benefit from his investment in such training. In addition, frequent competition procedures resulting from short-term PPP contracts or concessions are thought to increase the overall costs of a PPP. One stakeholder says that in many cases it is in the public interest to allow service delivery to mature and improve over a longer period, to ensure greater innovation and experimentation to find the best ways of delivering public services. Shorter-term contracts, on the other hand, might encourage the operator to focus on maximising revenue generation before the next competition.

One contributor suggests that it is in any case difficult to set criteria for an acceptable term for PPP projects. Another warns against limiting the length of PPP contracts, which might decrease private interest in such contracts. Conversely, some contributors share the Commission's concern regarding the effects of long-term contracts on competition and equality of treatment.

4.4.2.3. Adjustments to long-term PPPs over time

An overwhelming majority of contributors to the consultation acknowledges the need for adjustments to long-term PPPs over time. It is considered crucial that the initial PPP contracts provide for a certain degree of flexibility. Various contributors say that public services, in particular, need to be adjusted regularly to the changing needs of consumers and public authorities. Thus, PPP contracts should have some scope for adjustment. Furthermore, such provisions in the initial contract are considered unproblematic as they are laid down under conditions of full competition.

Various stakeholders say a new public procurement procedure is needed if the overall object of the contract changes. Other stakeholders report that in practice abuses such as unwarranted adjustments of PPP contracts are rare and do not justify regulatory action. One contributor refers to experience suggesting that reopening negotiations due to substantial modifications of a contract usually results in a better

[11] Point 46 of the Green Paper.

deal for the original private partner, rather than an improvement in the public interest.

Some stakeholders argue that adjustments to the PPP contract or concession should be allowed, even if they are not provided for in the initial contract or concession. They argue that not all needs for future adjustment of a contract can be foreseen when it is concluded and only practical experience with performance of the contract show whether and where adjustments over time are necessary.

A number of contributors express an interest in EC rules providing clarification on the types of changes in the course of the execution of a PPP which are compatible with EU law.

Among those contributors who criticise the adjustment of PPP contracts and concessions over time, several say that readjustment clauses can have discriminatory effects. As an example they cite the case of exaggerated traffic forecasts in the initial bid making it at first sight economically advantageous. If the public authority agrees to the bidder's subsequent request to readjust the contract, this might discriminate against competitors who based their initial bids on more realistic estimates. Along the same lines, another contributor points out that many bidders tend to assume time limits for completion of the project which turn out to be unrealistic. Subsequent amendment of the contract, leading to an extension of the time limits for completion, would be unfair to those competitors who did not obtain the contract because they were more realistic in their estimates.

4.4.3. Views on potentially discriminatory effects of practices for evaluating tenders

Question 12 of the PPP Green Paper

Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

Not many of the contributors are aware of discriminatory practices for evaluating tenders. Some contributors point out that if discrimination occurs, national legislation, rather than EC rules, should address such grievances.

One contributor says that complex selection criteria for evaluating tenders make it easier for contracting authorities to discriminate. Other contributors say there is a risk of discrimination if invitations to tender do not contain all the details of the award criteria or are in other respects not precise enough. Some stakeholders cite cases of evaluation practices with potential discriminatory effects where qualification criteria are used as award criteria and where evidence for quality and competence has to be given in the form of references, proofs of financial standing and experience: they say this favours established bidders.

Another contributor reports cases where evaluation criteria were set which had not been made clear in advance or where over- or underproportional weight was given to known criteria. Other issues raised in this context are amendments to technical requirements or to evaluation criteria made during the tender procedure, the evaluation of subjective award criteria by "experts" who do not know the subject well enough and ratings being given in the course of an evaluation without proper (or any) justification.

One stakeholder refers to the public sector comparator as a useful method of evaluating bids.

4.4.4. Step-in arrangements: considered to be indispensable for the financing of PPPs

Question 13 of the PPP Green Paper

Question
Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?
Main views of stakeholders
• **There is broad consensus that step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems.**

Few contributors consider "step-in" type arrangements to present a problem in terms of transparency and equality of treatment. No other standard clauses are considered likely to present similar problems.

Nearly all stakeholders who express an opinion on this issue explain that step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems, as these clauses allow the parties to avert termination of the PPP contract or concession if the private PPP contractor is in breach of the contract. One stakeholder explains that step-in rights are particularly important to safeguard the investment of banks, when the operator is a Special Purpose Vehicle (SPV: a consortium established for the purpose of PPP award procedures) and the value of the bank's investment thus depends primarily on the income stream from that project.

Step-in clauses are considered a substitute for other, more expensive forms of guarantee, such as personal or collateral securities. Thus, they make the overall project cheaper. Apart from this, step-in clauses are considered to be advantageous to contracting authorities as the stepping-in lender could revive the project and therefore avoid disruption of the service.

Some stakeholders point to the alternative scenario to stepping-in by the financial lenders: the potentially badly performing project would have to be put out to tender again and it might be difficult to find someone who is interested. Furthermore, a new public procurement procedure is considered to be time-consuming, and time is particularly tight for projects which are already in a critical condition.

Conversely, the risk of financial parties misusing such clauses is considered to be low, particularly as actual recourse to step-in clauses – often viewed as a temporary crisis measure – is extremely rare in practice. Nevertheless, some stakeholders insist that clear procedures for stepping-in have to be set out in the initial contract, to ensure adequate transparency and to give local authority the possibility of keeping control over a private party stepping into the contract. It is reported that usually step-in clauses are supplemented by a direct agreement between the contracting authority and the lenders. Various stakeholders say that one of the reasons for step-in clauses not presenting a problem in terms of transparency and equality of treatment is the fact that they are concluded under full competition.

Some stakeholders fear that if the EC legislator questions the current form of step-in clauses, this might have negative impacts on the future financing of PPP projects.

On a more general note, some contributors say that cession clauses in PPP contracts should be allowed. Such clauses reflect a balance between the public interest in correct performance and the private interest in being able to treat the PPP contract as an asset, which should in principle be transferable to third parties. Against this background, public authorities should – according to two contributors – be allowed to object to cessions, but need to back any such objection with objective reasons. These principles, according to another stakeholder, should not only apply to a change in the public authority's contract partner, but also to a change in the principal shareholder of the contract partner. One public procurement expert adds that there is no reason for a new public procurement procedure in cases of a change in ownership on the private contractor's side. According to this view, the purpose of public procurement regulation is not to safeguard the authority's freedom of choice, but to limit the authority's freedom to choose its contracting partners to prevent discrimination. This objective is not in any way prejudiced by a decision by a private contracting partner to assign the contract for commercial reasons.

4.4.5. No need for clarification of certain aspects of the contractual framework of PPPs at EC level

Question 14 of the PPP Green Paper

Question *Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?*
Main views of stakeholders • **A large majority of stakeholders say that an EC initiative on the contractual framework of PPPs is not needed. A considerable number of stakeholders ask, however, for some sort of clarification in this area.**

A large majority of contributors express themselves against any EC initiative on the contractual framework for PPPs, arguing that on the one hand this area falls within national competence for contract law and that on the other hand new EC rules might complicate existing public procurement procedures and thus lead to more bureaucracy.

A considerable number of stakeholders are, however, in favour of some sort of clarification at EC level in this area. Issues which – according to these stakeholders – require clarification are the extent of the rights and obligations of the contractual partners, the requirement that contracting authorities compare the advantages of private and public performance, the standardisation of contracts and the procedures for regulating conflicts. An argument in favour of such an initiative is – according to one contributor – the possible reduction of sometimes prohibitively high transaction costs.

Many stakeholders believe, however, that the relevant clarifications should be provided at national, rather than at EC level. One stresses that the introduction and assessment of contractual standards for PPPs is an issue for private parties.

4.5. Subcontracting

4.5.1. Perceived problems in relation to subcontracting

Question 15 of the PPP Green Paper

Question *In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.*
Main views of stakeholders • **A significant majority of stakeholders do not perceive problems in relation to subcontracting.** • **Problems reported by many other contributors relate to the supposedly weak position of subcontractors and uncertainties regarding the applicable EC law.**

4.5.1.1. Overview

A significant majority of stakeholders do not perceive problems in relation to subcontracting. Among the large number of contributions reporting problems in this area, one group of stakeholders expresses a certain scepticism towards subcontracting in general, another group welcomes the possibility of subcontracting, but complains about the limiting factors. Issues raised by contributors who are rather sceptical about the current practice of subcontracting in the Member States include the reduced control that public authorities can exercise over subcontractors, the difficult position of subcontractors vis-à-vis the main contractors and uncertainties with regard to the applicable EC law.

4.5.1.2. Problems related to control over the performance of public services

In principle, public services are the responsibility of public authorities. Therefore, in the view of various stakeholders, public authorities have to retain a certain level of control over the actors delivering such services. In the view of these stakeholders, subcontracting limits this control. For example, if public services are subcontracted the contracting authorities might have difficulty contacting the undertaking actually performing the service. This is thought to lead to delays, which might affect the quality of the respective service. One stakeholder therefore suggests setting out clearly in the contractual framework when and under what conditions subcontracting is permitted. This suggestion is supported by another stakeholder who believes that – as a basic principle – the concessionaire needs to perform the public service himself and subcontracting should therefore be considered an exception to this rule, requiring special consideration in the initial contract.

4.5.1.3. Problems related to the position of subcontractors

Some stakeholders point to the pressure various contractors allegedly exert on their subcontractors. According to them, subcontractors have to accept low prices and/or inadequate social rules. In the view of another stakeholder this risks leading to a degradation of the quality of public services.

One association points to the specific problems architects encounter when they obtain subcontracts in the course of a PPP. The association fears that subcontracting dis-empowers architects from influencing how the construction in question is carried out, which might have negative impacts on the final product.

One contributor is concerned about the poor capacity of subcontractors to cover all risks linked to their work, while another warns that, if the global contractor passes all risks to subcontractors, he may have no incentive to manage all the issues arising effectively himself.

4.5.1.4. Uncertainties with regard to the applicable EC law

A number of stakeholders are concerned about the lack of clarity of rules governing subcontracting at EC level as the rules vary depending on whether the underlying legal arrangement is defined as a public contract or a concession and whether the specific Public Procurement Directives apply. Consequently, stakeholders ask for a clearer distinction between contracts and concessions and between the scope of Directive 2004/17/EC and Directive 2004/18/EC. Reportedly, these uncertainties have caused confusion in practice, which is considered not to be sustainable on a commercial basis. One contributor complains about the lack of a clear definition of subcontracting at EC level and – due to different interpretations of EC law – the heterogeneity of contractual clauses applied in the Member States.

4.5.1.5. Other problems related to subcontracting

One contributor highlights the problem of "secondary markets", where a private contractor who entered into the original PPP sells on his share of the PPP contract to another private sector provider. While in these cases the service is still delivered and the requirements of the contract met, the private company that entered into the original agreement can make sizeable profits. There is criticism that none of this additional profit is passed to the public sector.

Another contributor says that – contrary to the ECJ judgment C-314/01[12] – Member States prohibit the transfer of the actual performance from the winner of the competition to a third party.

Some contributors are discontent with the "double tendering" requirement in the case of public contracts awarded to companies which are partly owned by the public sector. As these companies risk being considered contracting authorities, they are subject to tendering procedures in relation to their downstream contracts. This is considered to constitute a competitive disadvantage vis-à-vis their private competitors.

4.5.2. Clear opposition to more detailed rules for subcontracting

Question 16 of the PPP Green Paper

[12] ECJ, C-314/01, ECR 2004, not yet published. In paragraph 46 of this judgment the ECJ states that a tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

Question *In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?*
Main views of stakeholders • **There is broad consensus against new initiatives in the area of subcontracting, in particular as regards the potential extension of tendering requirements to such contracts.** • **A substantial number of stakeholders consider additional rules in this area useful, in particular to guarantee fair competition.**

4.5.2.1. Arguments against an extension of tendering rules for subcontracting

An overwhelming majority of contributors argue against new initiatives in the area of subcontracting, in particular as regards the potential extension of tendering requirements to such contracts.

Most of those who oppose rules extending tendering requirements to the conclusion of subcontracts argue that PPPs are characterised by the transfer of risks to one private party. They contend that this private party needs to have full flexibility when fulfilling the contract, in particular when managing the risks assumed as part of the contractual obligations. Rules limiting the main contractor's ability to choose his subcontractors would limit this flexibility unhelpfully, for example by preventing him from cooperating with undertakings with which he has long–standing, smoothly running relations.

This is, however, not the only perceived PPP-specific problem in relation to extending public tendering requirements to the selection of subcontractors. In the case of many PPP procurement procedures bidding consortia – usually referred to as Special Purpose Vehicles (SPV) – are established. A substantial number of contributors consider that the opportunity for members of these consortia to obtain parts of the awarded contract directly is the driving force behind their establishment. These stakeholders believe that introducing an obligatory tendering procedure for subcontracting would have adverse effects on the formation of such consortia and PPPs more generally. One stakeholder summarises these adverse effects as follows: "To introduce rigidity into the subcontract level would decrease the ability of the SPV and its principal subcontractors to manage their risks, potentially increase costs or reduce the level of risk transfer to the private sector and add to the cost and duration of the procurement process."

Other consequences to PPPs of introducing a formal tendering procedure for subcontractors, according to many stakeholders, include delays, higher costs and reduced efficiency. One stakeholder explains that bidders need to include considerable time for procurement activity in their schedules plus a safety margin for legal challenges if procurement rules apply subsequent to the award of a PPP contract or concession. This could – according to this stakeholder – turn a potentially viable PPP project into a non-viable project.

It is also argued that imposing downstream competition would be contrary to the spirit of PPPs leading to a mere set of subcontracts, and that even upstream competition would be distorted as the candidates, faced with the unknown quantity of their subcontractors' future competitive bidding procedures, could not submit their best prices. Many other contributors state that the introduction of a rigid tendering regime downstream of the award of the PPP does not provide any advantages for the public authority compared to the status quo. They argue that public authorities can obtain sufficient control over subcontractors by requiring bidders to indicate their proposed subcontractors in the course of the initial PPP competition. Consequently, the choice of subcontractors would be part of the competition for the initial PPP contract or concession, making downstream competitive tendering redundant. Along these lines, one stakeholder insists that the initial contract should clearly spell out the conditions for changing subcontractors. Another contributor adds that if the contracting authority is dissatisfied with the performance of subcontractors, it has recourse to the payment and termination rights set out in the contract with the main contractor.

Some contributors consider Article 60 of Directive 2004/18/EC, which sets out specific requirements for works concessionaires in relation to subcontracting, as an example of unduly limiting the main contractor's flexibility in choosing subcontractors. This provision is considered to jeopardise the financial viability of PPP concession models, and the scope for setting up such concessions. One contributor criticises it as being at odds with the general lack of regulation of subcontracting pursuant to the award of public contracts.

Another stakeholder argues that the introduction of new tendering rules for subcontracting would not be in line with the existing system of public procurement at EC level as set out in Article 32(2)(c) of Directive 92/50/EC[13] and construed by the ECJ in case C-176/98[14]. This holds that a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract is entitled to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract. Such reliance on third parties would – according to this stakeholder – be impossible if subcontractors could only be selected subsequent to a separate formal tendering procedure.

4.5.2.2. Proposals for more detailed rules on subcontracting

A substantial number of stakeholders consider that existing public procurement rules do not provide sufficient guarantee of fair competition in subcontracting and therefore advocate obligatory tendering in this respect. Other advocates of obligatory tendering argue that large sums of public money are involved in PPPs and that the subcontractors usually assume public duties which should – on principle – be performed by the main contractor himself.

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13 Directive 92/50/EC relating to the coordination of procedures for the award of public service contracts. This stipulation corresponds to Article 48(2)(b) of Directive 2004/18/EC.

14 C-176/98, *Holst Italia SpA v. Commune di Cagliari*, Judgment of 2 December 1999, paragraph 27.

Other stakeholders in favour of more detailed rules say that contracting authorities need to maintain control over subcontracting, implying a right to be informed of the identity of subcontractors and the opportunity to object to the subcontractor.

One stakeholder explains that unless subcontracting is subject to a formal tendering procedure, small and medium-sized enterprises will not take any part in PPPs. Some argue that the subcontracting of substantial parts of the project should in any case be limited, to prevent the whole contract being transferred to subcontractors.

Other stakeholders stress the need for new rules, to avoid undue lowering of social standards when the main contractor awards subcontracts. Such rules should at least prevent the conditions of the contract between the main contractor and the subcontractors from falling below the standard set between the contracting authority and the main contractor. Other rules on subcontracting proposed by stakeholders entail a compulsory minimum share of subcontracts being awarded to SMEs or local companies. Conversely, one stakeholder insists that the choice of SMEs should always be guided by economic, rather than regulatory, obligations.

4.5.3. Majority of stakeholders against a supplementary initiative at Community level to clarify or adjust the rules on subcontracting

Question 17 of the PPP Green Paper

Question *In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?*
Main views of stakeholders • **There is no agreement on the need for supplementary initiatives in this area.**

A large number of contributors contest the need for clarification on subcontracting. Many other stakeholders disagree and ask for clarification on various issues.

Areas of clarification identified by contributors are the definition of the terms "bodies governed by public law" in the sense of Article 1(9) of Directive 2004/18/EC and "subcontracting", the provision for contracting authorities to require or forbid subcontracting or to limit the number of subcontractors in the invitation for tenders and the delimitation of the scope of Directives 2004/17/EC and 2004/18/EC. The latter refers to the specific subcontracting rules for works concessionaires under Title III of Directive 2004/18/EC and the different rules applicable to subcontracting to related/affiliated undertakings (Article 63(2) of Directive 2004/18/EC and Article 23 of Directive 2004/17/EC).

Another contributor asks for more clarity regarding the application of EC tendering requirements when contracts are subcontracted to sister companies or affiliated companies that are part of the consortium which won the main contract.

4.6. Institutionalised PPPs

4.6.1. Views on the compliance of arrangements for institutionalised PPPs with Community law on public contracts and concessions

Question 18 of the PPP Green Paper

Question *What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not* ?
Main views of stakeholders • **There is no agreement on whether or not current institutionalised PPP practice in the Member States actually complies with Community law on public contracts and concessions.** • **Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance fairly positively.** • **Many contributors from the private sector perceive current compliance with Community law on public contracts and concessions as deficient in certain respects, pointing to circumvention of public procurement law and distortions of competition.**

In general, the contributions reflect the divergences between the different national legal traditions and practices as regards undertakings set up jointly by public and private companies to provide infrastructure projects or to perform public services (institutionalised PPPs – IPPPs). While some Member States have had recourse to IPPPs since the beginning of the 20th century, the concept is rather new in other Member States. Depending on their national traditions, some Member States have a quite comprehensive legislative framework in place. It appears from the contributions that, in practice, important fields of application for IPPPs include the water, environment, energy and transport sectors.

There is no agreement on whether or not current IPPP practice in the Member States complies with Community law on public contracts and concessions. Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance fairly positively. Conversely, many contributors from the private sector perceive current compliance with Community law on public contracts and concessions as deficient in certain respects.

The main deficiencies perceived include the circumvention of public procurement law and distortions of competition.

As regards circumvention of public procurement rules, some stakeholders contend that in certain Member States public procurement procedures aimed initially at concluding contractual PPPs finally result in the conclusion of IPPPs with actors who did not participate in the original public procurement procedure. This practice, it is argued, allows the contracting authorities to profit unduly from technical solutions identified in the original tendering procedure.

Distortion of competition is argued to arise in particular from the participation of IPPP-entities in award procedures. It is argued that the public IPPP partner has, firstly, preferential access to information relevant to the proposed project and, secondly, an advantageous cost structure – compared to all private competitors – due to its use of public goods without a payment corresponding to economic reality. In line with this complaint, one contributor reports potential conflicts of interest regarding public authorities acting at the same time both as contracting authorities and as partners of IPPPs.

Independent of their opinion on the compliance of current IPPP practice with the EC Public Procurement Directives, a substantial number of contributors deplore the lack of legal certainty at EC level regarding relations between contracting authorities and other parties which are so close that – in public procurement terms – they are not considered distinct from each other ("in-house relations").[15] Some contributors perceive the lack of clarity on this issue as a source of abuse by public authorities; one contributor believes that this prevents public authorities from embarking on such arrangements at all.

Another contributor argues that the restrictive jurisprudence of the ECJ on in-house relations limited attempts by public authorities to circumvent public procurement law by this means.

Various contributors do not consider IPPPs any different from contractual PPPs from a public procurement perspective. Consequently, these contributions consider the distinction between these two models made in the PPP Green Paper to be artificial. One of these contributions concedes, however, that opening the capital of existing public companies to the private sector might pose certain problems which could justify specific measures.

There is no consensus as to whether public procurement law or other issues, for example free movement of capital, constitute the main legal problems in relation to IPPPs. Various contributors argue that the creation of mixed public private companies has nothing to do with EC public procurement law at all, because it falls within the area of administrative organisation, which is not a matter for the European Union to regulate.

4.6.2. Diverging opinions on the form, rather than on the general necessity, of a Community initiative on institutionalised PPPs

Question 19 of the PPP Green Paper

Question *Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?*
Main views of stakeholders

[15] Case C-107/98, *Teckal*, Judgment of 18 November 1999, point 50. The ECJ judgment in case C-26/03, *Stadt Hall*e, Judgment of 11 January 2005, was released after this consultation.

- **A clear majority of contributions favour an EC initiative on institutionalised PPPs, primarily to provide clarification on applying existing public procurement rules to setting up such PPPs.**
- **In particular, there are calls to clarify the definition of in-house relations at EC level.**
- **A majority of contributors favour guidelines or an interpretative communication, rather than legislation, as an appropriate form of clarification on IPPPs.**
- **Many contributors are opposed to any initiative on IPPPs at EC level.**

4.6.2.1. Overview

A clear majority of contributions favour an initiative at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project. Some contributions even stress the urgency of an EC initiative in this area. A majority of those contributors favouring a Community initiative would prefer the Commission – at least as a first step – to provide guidelines or other forms of clarification on the application of existing public procurement rules to the establishment of IPPPs. Other contributors in favour of a Community initiative argue that EC legislation would be the appropriate response to perceived difficulties in this area. Conversely, a large number of contributions contest the need for any Community initiative in the area of IPPPs.

4.6.2.2. Views in favour of a Community initiative on IPPPs

Reasons given for a Community initiative on IPPPs

The main reason for requesting a Community initiative on IPPPs is the perceived lack of clarity of the rules governing in-house relations and – this is stressed in particular by contributors from the public side – the restrictive construction of the in-house exemption from public procurement law given in the judgment of the European Court of Justice in the "Teckal" case. Two contributors argue that the EC legislator has to take action, rather than leaving it to the ECJ to settle the issues, as the ECJ is considered not to be in a position to provide the necessary clarity. Another, more general justification for a Community initiative in the area of IPPPs is – according to various contributions – the need for transparent and competitive selection of private partners for these projects. One contribution argues that a Community initiative is needed because the variety of different national approaches on this issue distorts the Internal Market .

With regard to the need for a Community initiative in the area of IPPPs, certain contributions distinguish between cases where mixed capital entities are jointly established by public and private entities and cases where the shares of public companies are opened to private capital. Some contributors say that while, for the first category of IPPPs, concrete clarification at EC level is necessary, the second category of IPPPs should be the subject of an exchange of best practice or a reflection group. Another contributor, however, considers that specifically for the second category of IPPPs clarification has to be provided by means of a regulation.

Form of a Community initiative on IPPPs

A majority of those contributors who are in favour of a Community initiative opt for the adoption of guidelines or an interpretative communication, rather than legislative initiatives, for the following reasons: the expected loss of flexibility hindering the smooth development of innovative IPPPs due to the rigidity of legislation, the lack of sufficient experience as yet to adopt legislation valid for many years, the difficulty of providing clarity by means of legislation, which itself requires interpretation, and the urgency of clarification on this matter, which cannot be catered for by a (usually lengthy) legislative procedure.

Some stakeholders argue that an interpretative communication could pave the way for the subsequent adoption of EC legislation. Whatever the case, guidelines or an interpretative communication must deal with concrete cases to be of real value to practitioners.

Only a minority of contributors advocate specific EC legislation on IPPPs, for example in the form of a proper PPP Directive. According to one stakeholder, only EC legislation could harmonise existing national measures, which risk distorting the common market.

Possible content of a Community initiative on IPPPs

As regards the content of an EC initiative on IPPPs, various public contributors call upon the EC legislator to define "in-house" more broadly than the ECJ did. Other contributors from the public side explain that the correct understanding of "in-house" should allow municipalities to entrust tasks considered to be a local public service to inter-communal structures without obliging them to call for tenders. According to one contribution, a broader interpretation of the in-house criterion would imply that ownership by the relevant contracting authority of a 50% capital share in the IPPP entity would qualify as control over that undertaking. Several contributors argue in favour of drafting "de-minimis rules" for the application of public procurement provisions to local PPPs. Others request the EC legislator to respect the subsidiarity principle when clarifying the notion of "in-house".

One contribution asks for clarification of the application of public procurement rules to IPPPs in general. Various other contributions highlight the need to require publication of public authorities' intention to choose a private partner for an IPPP. Some contributions favour a clearer definition of the status of the IPPP entity, others wish to see public authorities required to justify their recourse to IPPPs. A number of contributions demand equal access to subsidies and more generally the application of the EC Treaty principles to setting up IPPPs. Several contributions oppose compulsory "double tendering" for IPPPs – i.e. tendering to select a private partner for an IPPP followed by tendering for the award of a specific task.

Various contributions highlight the need to clarify the application to IPPPs of EC law principles other than those concerning the choice of a private partner. State aid rules and the free movement of capital (Article 56 of the EC Treaty) are mentioned several times in this context.

4.6.2.3. Views opposing a Community initiative on IPPPs

A large number of contributors argue against any Community initiative on IPPPs.

Some contributors consider an EC initiative redundant on the grounds that the existing public procurement rules provide sufficient clarity on setting up IPPPs. Conversely, some others believe that public procurement rules do not apply to IPPPs and therefore do not require clarification. Various contributors explain that under the subsidiarity principle the Community does not have a legal basis for such an initiative. Two contributors submit that IPPPs often originate from private initiatives. If, however, private participation in an IPPP was subject to prior competition, there would be less incentive for private parties to initiate IPPPs. Furthermore, a group of contributors argue that the existence of several hundred IPPPs in Germany proves, from a German perspective, that an EC initiative in this area is not needed. Some contributors say that no additional initiative should be taken in the energy sector, which is considered to be already overregulated.

The arguments made against an EC initiative on IPPPs are also procedural. So, for example, various contributors refer to the inappropriate timing of taking an initiative in this area now: prior to any Community initiative, the so-called Legislative Package[16] needs to be well implemented in the Member States. Others are of the opinion that national IPPP practices (including economic and social aspects) need to be thoroughly assessed before a decision on an EC initiative in the IPPP area can be taken.

4.7. Measures and practices perceived as barriers to the introduction of PPPs

Question 20 of the PPP Green Paper

Question
In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?
Main views of stakeholders
• **The existence of too many and too strict rules is considered an obstacle to the development of PPPs by a clear majority of contributors.**

A clear majority of those contributors who comment on measures or practices perceived as barriers to the introduction of PPPs say that too many and too strict rules hamper the development of PPPs. In particular, contributors from the public side (but also various private undertakings and associations) complain that EC, national and local rules on PPPs limit the flexibility they say is needed to set up such projects. The restricted recourse to the negotiated procedure is cited as one example of rules adversely affecting PPPs. National tax legislation is also singled out by several stakeholders as being detrimental to the formation of PPPs. A considerable

[16] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

number of contributors say that this perceived plethora of rules applicable to PPPs results in high transaction costs. They argue that these costs may discourage public authorities from launching PPP projects and private parties from participating in competitions for the award of PPPs.

A substantial number of stakeholders consider that the lack of legal clarity and common rules for the formation and performance of PPPs across all Member States jeopardises their potential success. Many stakeholders say that uncertainty about future EC legislation on PPPs, possibly including the adoption of more rigid rules, adversely affects the setting up of such projects. A number of stakeholders who complain that the rules on PPPs are unclear conclude that a regulatory framework for PPPs needs to be established at EC level. In this context some stakeholders are particularly concerned about the lack of proper review mechanisms for disputes arising when PPPs are awarded or when public procurement rules are entirely ignored by contracting authorities. Another example of rules not defined clearly enough are those relating to in-house constellations. Divergences between national rules on PPP are also cited as barriers to the introduction of such projects.

In relation to the establishment of PPPs, several stakeholders complain of undue privileges being granted to public companies to the detriment of their private competitors. According to some contributors, such discriminatory practices include different tax provisions, allegedly unduly favouring public undertakings, unequal access to subsidies and the recourse to in-house constellations referred to above.

Other major issues which many stakeholders suspect impede the development of PPPs include EU co-financing as part of the EC Regional Policy and, to a lesser extent, state aid rules. The perceived incompatibility of Cohesion and Structural Funding with PPPs, and more particularly the presumption that EU grant aid must imply public ownership of the infrastructure resulting from a PPP, appears to be a problem which goes beyond the water sector. In general, the application of Regional Policy to PPPs is considered to require clarification. Various other contributors ask for clarification of the relationship between state aid rules and the EC Public Procurement Directives.

Many stakeholders cite lack of experience, the slow liberalisation of certain sectors and – more generally – the absence of strong political will at all levels to promote PPPs as barriers to their development.

4.8. The need for collective consideration at Community level with regard to PPPs

Question 22 of the PPP Green Paper

Question *More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?*
Main views of stakeholders • **There is broad support for some sort of collective consideration of PPP issues at EC**

level.

- **No agreement exists on the content and form of such an initiative.**

4.8.1. Views on the possible scope of collective consideration at Community level

A large number of contributors favouring a collective consideration of PPP issues at EC level advocate the exchange of best practice, although some stress that one also needs to learn from bad experiences. Some contributors consider the Resource Book on PPP case studies released by the Directorate-General for Regional Policy in June 2004[17] as a good example of a European initiative promoting the exchange of experience with regard to PPPs.

A substantial number of contributors expect this collective consideration to result in clarification of applicable Community rules and the establishment of guidelines. Some contributors contend that clarification on PPPs should not be limited to legal issues. Others express their interest in standardised rules or model invitations to tender based on experience to date. Other suggestions on the scope of collective consideration of PPPs include European-wide dissemination of PPP information, promotion of "scientific assessments", coordination of existing national networks, training and certification of "PPP mediators" and the resolution of potential conflicts between EC and national law on PPP-related issues. One contributor from the public sector believes that such collective consideration should ensure a level playing field between public and private operators as regards PPP know-how, from which small contracting authorities, in particular, could benefit.

Another contributor suggests that a collective consideration of such matters should include the monitoring of transparency, non-discrimination and more generally the proper functioning of PPPs in the Member States. Another important topic is setting up a benchmarking exercise, one contributor adds.

A substantial number of contributors are of the opinion that the result of such collective consideration should be left open and in no case prejudge the question of whether Community legislation on PPPs is appropriate, while two stakeholders suggest that the collective consideration should contribute to the preparation of an EC initiative on PPPs.

4.8.2. Views on the form of a collective consideration of PPPs at Community level

Compared to the opinions on the possible scope of a collective consideration of PPPs at EC level, the contributions on its form are less varied. The majority of contributions argue in favour of establishing a permanent PPP unit, which might take the form of a European PPP agency, a centre of excellence/resource and documentation centre or an observatory. At least for the observatory some contributors argue that it should be independent. One contributor recommends that a High Level Group should supervise and coordinate the work of the PPP unit.

[17] Published on the website: http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm.

A substantial number of other contributors vote for less institutionalised models, in particular arguing that a permanent structure would add to existing bureaucracy. Their preferred option is a Task Force. One stakeholder favours opening a dialogue between the Commission and interested parties. Another recommends building the collective consideration on existing fora such as the Advisory Committee for Public Works Contracts.[18]

One contributor stresses that any collective consideration of these issues needs to be transparent.

If a collective consideration of PPPs were to be established at EC level, the large majority of contributions leave no doubt that this would be the task of the European Commission. Some contributors state that a European Commission initiative could be limited to promoting successful national PPP networks.

4.8.3. Arguments against collective consideration at Community level

Few contributors argue against any collective consideration of PPP aspects at EC level. Those that do cite the existence of a European Platform already dealing with issues such as PPPs, making a parallel discussion forum redundant, the need to deal first with the PPP-related issues highlighted in the "Report of the High Level Group on the Trans-European Network Group"[19] and concern that collective consideration at EC level might lead to Community legislation on PPPs, thereby fostering an approach to this subject which the stakeholder concerned considers to be inappropriate.

Some contributors' support for collective consideration of PPP issues at EC level is conditional upon the participation of specific stakeholders such as representatives of local and regional government, civil society and employees.

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[18] See Council Decision 71/306/EEC setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p.15).

[19] Accessible from the PPP website of the Directorate-General for the Internal Market and Services: (http://europa.eu.int/comm/internal_market/publicprocurement/docs/ppp/2003_report_kvm_en.pdf).

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1.	3P Public Private Partnership Forum
2.	Agenzia Sviluppo Lazio SpA
3.	AKD Prinsen Van Wijmen
4.	Aktionsgemeinschaft Wirtschaftlicher Mittelstand – AWM
5.	Algemeen Verbond Bouwbedrijf – AVBB
6.	Allen & Overy
7.	Architects' Council of Europe – ACE
8.	Arrowsmith Sue
9.	Asociacion Espanola de Abasteciminetos de Agua y Saneamientos – AEAS
10.	Asociación Española de Empresas Gestoras de los Servicios de Agua a Poblaciones – AGA
11.	Asociación para la mejora del servicio farmaceutico
12.	Association des Maires de France – AMF
13.	Association des Maires de Grandes Villes de France – AMGVF
14.	Association of European Chambers of Commerce and Industry – EUROCHAMBRES
15.	Association of Public Sector Trade Unions – CESI
16.	Associazione Imprese Generali – AGI
17.	Associazione Italiana Societa Concessionarie Autostrade e Trafori – AISCAT
18.	Associazione Nazionale Costruttori Edili – ANCE
19.	Associazione Nazionale dei Comuni Italiani – ANCI
20.	Autobahnen und Schnellstrassen Finanzierung Aktiengesellschaft – ASFINAG
21.	Autorita per la Vigilanza sui Lavori Pubblici
22.	Bayerisches Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie

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24.	Belgique
25.	Berliner Senatsverwaltung für Finanzen
26.	Bezirksregierung Münster (Vergabekammer)
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28.	Bombardier
29.	Bouygues Construction
30.	Bouygues SA
31.	British Consultants and Construction Bureau – BCCB
32.	Bundesarchitektenkammer /Bundesingenieurkammer
33.	Bundesministerium für Wirtschaft und Arbeit (Deutsche Bundesregierung)
34.	Bundesverband BPPP
35.	Bundesverband der Deutschen Entsorgungswirtschaft E.V. – BDE
36.	Bundesverband der Deutschen Gas- und Wasserwirtschaft E.V – BGW
37.	Bundesverband deutscher Unternehmensberater – BDU
38.	Bundesverband öffentlicher Banken Deutschlands – VOB
39.	Bundesvereinigung der Kommunalen Spitzenverbände
40.	C.R.E.A.M. Europeaid
41.	Caisse des Dépôts et Consignations
42.	Centre Européen des Entreprises a Participation Public et des Entreprises d'intérêt Economique Général – CEEP
43.	Chambre de Commerce et d'Industrie de Paris – CCIP
44.	Community of European Railway and Infrastructure Companies – CER
45.	Confédération Européenne des Distributeurs d'Energie Communaux – CEDEC
46.	Confindustria
47.	Confservizi
48.	Conseil National de l'Ordre des architectes français

49.	Construction Confederation
50.	Convention of Scottish Local Authorities – COSLA
51.	Cosmopoli consultants
52.	Council of European Municipalities and Regions – CEMR
53.	Coutts Allister
54.	Delcros Peyrical Mirouse
55.	Department of Finance (Irish Government)
56.	Det Kommunale Kartel
57.	Deutsche Dienstleistungsgewerkschaft Ver.di
58.	Deutscher Gewerkschaftsbund – DGB
59.	Deutscher Städtetag
60.	Dexia Credit Local
61.	Electricité de France – EDF
62.	Erno Saisanen
63.	EUROCITIES
64.	European Aeronautic Defence and Space Company – EADS
65.	European Broadcasting Union – EBU
66.	European Builders Confederation – EBC
67.	European Construction Industry Federation – FIEC
68.	European Council for Non-Profit Organisations – CEDAG
69.	European Dredging Association – EuDA
70.	European Federation of Engineering Consultancy Associations – EFCA
71.	European Federation of Public Service Unions – EPSU
72.	European Free Trade Association – EFTA
73.	European International Contractors – EIC
74.	European Liaison Committee on Social Housing – CECODHAS

75.	European Transport Workers Federation – ETF
76.	European Union of House Builders and Developers – UEPC
77.	Eversheds
78.	Fédération Française des Entreprises Gestionnaires de Services aux Equipements, à l'Energie et à l'Environnement – FG3E
79.	Fédération Française du bâtiment
80.	Fédération nationale des collectivités concédantes et régies – FNCCR
81.	Fédération nationale des Travaux Publics
82.	Federation of national associations of drinking water suppliers and waste water services – EUREAU
83.	Federazione Imprese di Servizi – FISE
84.	Federazione Italiana per la Casa – FEDERCASA
85.	Flemish interprofessional employers' association – VOKA
86.	Foreign Office (Portugal)
87.	Forum Européen de l'Energie et des Transports
88.	France Telecom
89.	Gaz de France – GDF
90.	Gesellschaft für öffentliche Wirtschaft e.V.
91.	Grant Thornton UK
92.	Groupement des Autorités responsables de transport – GART
93.	Hauptverband der deutschen Bauindustrie
94.	Helman Wojciech
95.	IMS Ingenieurgesellschaft mbH
96.	Industriellenvereinigung
97.	Initiative pour des services d'utilité publique en Europe – ISUPE
98.	Institut de la gestion déléguée
99.	International Financial Services

100.	International Project Finance Association – IPFA
101.	Irish Business and Employers Confederation – IBEC
102.	Iron David
103.	Istituto Grandi Infrastrutture
104.	Istituto Studi Sviluppo Aziende Non Profit – ISSAN
105.	Karlavicius Vytautas
106.	Kauppa – Ja Teollisuusministeriö
107.	Kocian Solc Balastik
108.	Koninkrijk der Nederlanden
109.	KPMG Corporate Finance
110.	Local Government International Bureau
111.	Lopez-Ibor Mayor
112.	Société d'Economie Mixte
113.	Ministerio de Economia y Hacienda (Spain)
114.	Ministry of Economy on behalf of the Republic of Lithuania
115.	Ministry of infrastructure, Poland
116.	Mouvement des Enterprises de France – MEDEF
117.	National Assembly for Wales (Economic Development and Transport Committee)
118.	National Assembly for Wales (Local Government and Public Services Committee)
119.	Norton Rose
120.	Office for Public Procurement of the Slovak Republic
121.	OGNET
122.	Økonomi- og Erhvervsministeriet
123.	Österreichische Vereinigung für das Gas- und Wasserfach – ÖVGW
124.	Österreichischer Gemeindebund
125.	Österreichischer Rechtsanwaltskammertag – ÖRAK

126.	Österreichischer Städtebund
127.	Österreichischer Wasser- und Abfallwirtschaftsverband – ÖWAV
128.	Pinsents
129.	Polish Confederation of private employers
130.	PricewaterhouseCoopers
131.	Przespolewski Robert
132.	Regeringskansliet, Finansdepartementet (Swedish Government)
133.	Republik Österreich
134.	République Française
135.	Revue des concessions et des délégations de service public
136.	Royal Institution of Chartered Surveyors – RICS
137.	RWE Thameswater
138.	Schmidt Bechtle GmbH
139.	Schmitz et al
140.	SUEZ International Industrial and Services Group
141.	Svenska Kommunförbundet / Landstings Förbundet
142.	Syntec Informatique
143.	T & D International
144.	Tobin Christopher
145.	Unioncamere / CCIAA
146.	Union des Transports Publics – UTP
147.	Union des Villes et Communes de Walloni
148.	Union nationale des services publics – UNSPIC
149.	Union Network International – UNI
150.	Union of European Rail Industries – UNIFE
151.	Union of Industrial and Employers' Confederations of Europe – UNICE

152.	United Kingdom Government
153.	Veolia/Vivendi Environnement
154.	Verband der Elektrizitätswirtschaft – VDEW
155.	Verband deutscher Verkehrsunternehmen – VDV
156.	Verband kommunaler Unternehmen – VKU
157.	Verband kommunaler Unternehmen Österreichs (VKÖ) – eigene Stellungnahme
158.	Verband der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs
159.	Verbindungsstelle der österreichischen Bundesländer with contributions from • Amt der NÖ Landesregierung • Amt der OÖ Landesregierung • Amt der Tiroler Landesregierung • Amt der Vorarlberger Landesregierung • Amt der Wiener Landesregierung
160.	Verbond der Verzorgingsinstellingen – VVI
161.	Wirtschaftskammer Österreich – WKÖ
162.	Zentralverband des Deutschen Baugewerbes – ZDB
163.	Zweckverbände im Bereich der deutschen Wasserversorgung • Ammertal-Schönbuchgruppe • Fernwasserversorgung Franken • Wasserverband Siegen-Wittgenstein • Zweckverband Fernwasserversorgung Spessartgruppe • Zweckverband Hardtwasserversorgungsgruppe • Zweckverband Hohenloher Wasserversorgungsgruppe • Zweckverband mittelhessische Wasserwerke • Zweckverband Mutlanger Wasserversorgungsgruppe • Zweckverband Nordostwürttemberg

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164.	One position signed by four Portuguese individuals • Luis Parreirao • Rafael Rossi • Gustavo Fontes • Daniel Lopes • Duarte Leite de Campos

Public procurement: the Commission launches a debate on applying Community law to public-private partnerships

Reference: IP/04/593 Date: 04/05/2004

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IP/04/593

Brussels, 4 May 2004

Public procurement: the Commission launches a debate on applying Community law to public-private partnerships

On the basis of a Green Paper, the European Commission has launched a debate on the desirability of adapting the Community rules on public procurement and concessions to accommodate the development of public-private partnerships (PPPs). The main objective is to see whether it is necessary to improve the current rules in order to ensure that economic operators have access to PPPs under conditions of legal clarity and real competition. Over the last ten years PPPs have been developing in several member states. They are now used in many areas of the public sector. The choice of a private partner by a public authority must be made in accordance with Community rules on the awarding of public contracts. However, there is no specific system under Community law for PPPs and the Community rules on awarding public contracts are applied to PPPs with differing degrees of intensity. The Green Paper sets out the scope of Community rules, with a view to identifying any uncertainties and assessing to what extent Community intervention might be necessary. The full text of the Green Paper is available at the following address: http://ec.europa.eu/internal_market/ppp

Internal Market Commissioner Frits Bolkestein said: "PPPs are booming. They can be an important tool for improving the quality of public services and supporting growth in Europe. The EU needs a suitable regulatory framework for developing these partnerships in order to apply transparency and fair competition for the benefit of the taxpayer. There is a lot at stake, and I call upon all interested parties to respond to this consultation we will listen to what you have to say."

Under Community law there is no specific legal system governing the many different possible forms of PPPs. Contracts for these partnerships signed by public authorities with private companies are not, in general, covered by the EC Treaty rules on the single market. In certain cases, they can be subject to the detailed provisions of the Directives on public procurement. However, other cases and in particular certain "concessions" are not covered. The Community legal framework is thus the subject of more or less intensive Community coordination at several levels. It is necessary to ensure that this legal framework does not form an obstacle to economic

operators' access to the different types of PPPs.

To this end, the Green Paper sets out the way in which the rules and principles deriving from Community law on public contracts and concessions apply when a private partner is selected, and then for the duration of the contract, in the context of different PPP arrangements. The Green Paper also asks a set of questions intended to find out more about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suit the challenges and characteristics of PPPs.

The Green Paper addresses various topics directly linked to the public procurement aspect of PPPs, in particular:

- the framework for the procedures for selecting a private partner, and in particular the advantages in this context of the competitive dialogue procedure introduced by the new Directive on public procurement (see IP/04/150), which allows public authorities to hold discussions with applicant businesses in order to identify the solutions best suited to their needs;
- setting up of PPPs on the initiative of the private sector;
- the contractual framework and contract amendments during the life of a PPP;
- subcontracting.

In this regard, the Green Paper addresses both PPPs created on the basis of purely contractual links ("contractual PPPs") and arrangements involving the joint participation of a public partner and a private partner in a mixed-capital legal entity ("institutional PPPs").

The Green Paper is one of the priorities identified by the Commission in its internal market strategy for 2003-2006 (see IP/03/645 and MEMO/03/100) and contributes to the measures planned as part of the initiative on growth in Europe (see IP/03/1521).

On the basis of the Green Paper the Commission is launching a public consultation in which it seeks comments from all interested parties. The consultation period will end on 30 July 2004. On the basis of the contributions received, the Commission intends to draw conclusions and, where appropriate, submit concrete initiatives.

Interested parties are invited to send their replies to the questions set out in the Green Paper or any additional comments by mail to the following address:

European Commission

"Green Paper on PPPs and Community law on public procurement and concessions"

C **100 2/005**

B-1049 Brussels

Or by e-mail to the following address:

MARKT-D1-PPP@ec.europa.eu

To keep interested parties informed, contributions received by e-mail and details of the senders will be put on the Green Paper website (available at http://ec.europa.eu/internal_market/ppp), provided that the senders concerned have not expressed any objections to publication.

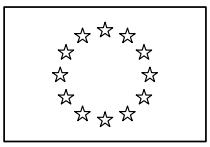
Background

Public private partnerships (PPPs) are forms of cooperation between public authorities and the world of business which aim to meet needs in the general interest. They result in the setting up of complex legal and financial arrangements involving private operators and public authorities carrying out infrastructure projects or services of use to the public. These partnerships have been developed in several areas of the public sector and are widely used within the EU to ensure the provision of services, in particular in the areas of transport, public health, education, public safety, waste management and water distribution.

Various factors explain the increased recourse to PPPs. In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. Another explanation is the desire to benefit more in public life from the know-how and working methods of the private sector. The development of PPPs is also part of the more general change in the role of the state in the economy which is moving from a role of direct operator to one of organiser, regulator and controller.

The full text of the Green Paper is available at the following address:

http://ec.europa.eu/internal_market/ppp



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.4.2004
COM(2004) 327 final

GREEN PAPER

ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

(presented by the Commission)

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1. DEVELOPMENT OF THE PUBLIC-PRIVATE PARTNERSHIP: FACTS AND CHALLENGES

1.1. The "public-private partnership" phenomenon

1. The term public-private partnership ("PPP") is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.

2. The following elements normally characterise PPPs:

- The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.

- The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.

- The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

- The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

3. During the last decade, the PPP phenomenon developed in many fields falling within the scope of the public sector. Various factors explain the increased recourse to PPPs. In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. Another explanation is the desire to benefit more in public life from the know-how and working methods of the private sector. The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller.

4. The public authorities of Member States often have recourse to PPP arrangements to undertake infrastructure projects, in particular in sectors such as transport, public health, education and national security. At European level, it was recognised that recourse to PPPs could help to put in place trans-European transport networks, which had fallen very much behind schedule, mainly owing to a lack of funding.[1] As part of the Initiative for Growth, the Council has approved a series of measures designed to

[1] See Communication from the Commission of 23 April 2003 "Developing the trans-European transport network: innovative funding solutions - interoperability of electronic toll collection systems", COM (2003) 132, and the Report of the high-level group on the trans-European transport network of 27 June 2003.

increase investment in the infrastructure of the trans-European transport network and also in the fields of innovation, research and development, mainly through forms of PPPs.[2]

5. However, while it is true that cooperation between the public and private sectors can offer micro-economic benefits permitting execution of a project that provides value for money and meets public interest objectives, recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints.[3] Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options, such as the conclusion of a more traditional contract.[4]

6. The Commission also notes with interest that some Member States and accession countries have created tools to coordinate and promote PPPs, aimed, *inter alia*, at disseminating "good practice" for PPPs at national or at European level. These tools aim to make related expertise mutually available (for example the Tasks forces in the United Kingdom or in Italy) and thus advise users about the different forms of PPP and their stages, such as initial conception, how to choose a private partner, the best allocation of risks, the choice of contractual clauses or even the integration of community financing.

7. Public authorities have also set up partnership structures with the private sector to administer public services, particularly at local level. Public services concerned with waste management or water or energy distribution are thus increasingly being entrusted to businesses, which can be public, private, or a combination thereof. The Green Paper on services of general interest points out in this context that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions, even if this service is deemed to be of general interest.[5] The European Parliament also recognised that compliance with these rules can be "an effective instrument for preventing restrictions of competition, while at the same time permitting State authorities themselves to define and monitor the conditions regarding quality, availability and environmental requirements."[6]

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2 Conclusions of the Presidency, Brussels European Council, 12 December 2003.

3 Eurostat, the Statistical Office of the European Communities, has on the 11th of February 2004 (cf. press release STAT/04/18) taken a decision on the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-government units. The decision specifies the impact on government deficit/surplus and debt. Eurostat recommends that the assets involved in a public-private partnership should be classified as non-government assets, and therefore recorded off balance sheet for government, if both of the following conditions are met: 1. the private partner bears the construction risk, and 2. the private partner bears at least one of either availability or demand risk.

4 See Communication from the Commission to the Council and to the Parliament " Public finances in EMU 2003", published in the European Economy No 3/2003 (COM (2003) 283 final).

5 COM (2003)270 final. See, for the text of the Green Paper and the contributions, http://europa.eu.int/comm.secretariat_general/services_general_interest.

6 Resolution of the European Parliament on the Green Paper on services of general interest, adopted on 14 January 2004.

1.2 The challenge for the Internal Market: to facilitate the development of PPPs under conditions of effective competition and legal clarity.

8. This Green Paper discusses the phenomenon of PPPs from the perspective of Community legislation on public contracts and concessions. Community law does not lay down any special rules covering the phenomenon of PPPs. It nonetheless remains true that any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (Articles 43 and 49 of the EC Treaty)7, which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.[8] Moreover, detailed provisions apply in the cases covered by the Directives relating to the coordination of procedures for the award of public contracts.[9] [10] These Directives are thus "essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones."[11] However, the application of the detailed provisions of these Directives is circumscribed by certain assumptions and mainly concerns the award of contracts.

9. The rules applicable to the selection of a private partner derive firstly from the definition of the contractual relationship which that party enters into with a

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7 The rules on the internal market, including the rules and principles governing public contracts and concessions, apply to any economic activity, i.e. any activity which consists in providing services, goods, or carrying out works in a market, even if these services, goods or works are intended to provide a "public service', as defined by a Member State.

8 See Interpretive Communication of the Commission on concessions in Community law, OJ C 121, 29 April 2000.

9 i.e. Directives 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, relating to the coordination of procedures for the award respectively of public service contracts, public supply contracts, public works contracts, and contracts in the water, energy, transport and telecommunications sectors. These Directives will be replaced by Directive 2004/18/EC of the European Parliament and of Council of 31 March 2004 relating to the coordination of procedures for the award of public works, supply and services contracts, and Directive 2004/17/EC of the European Parliament and of the Council of of 31 March 2004 relating to the coordination of procedures for the award of contracts in the water, energy, transport and postal services sectors, which will be published in the near future in the OJ. The [provisional] version of the new Directives may be consulted at the website http://www.europarl.eu.int/code/concluded/default_2003_en.htm.

10 Moreover, in certain sectors, and particularly the transport sector, the organisation of a PPP may be subject to specific sectoral legislation. See Regulation (EEC) No 2408/92 of the Council on access of Community air carriers to intra-Community air routes, Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States, Council Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Regulation (EEC) No 1893/91, and the amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM(2002) 107 final).

11 Joint cases C-285/99 and C-286/99, *Impresa Lombardini v. ANAS*, Judgment of 27 November 2001, paragraph 36 and, to that effect case C-380/98, *University of Cambridge*, ECR I-8035 and case C-19/00, *SIAC construction*, ECR I-7725.

contracting body.[12] Under Community secondary legislation, any contract for pecuniary interest concluded in writing between a contracting body and an operator, which have as their object the execution of works, the execution of a work or provision of a service, is designated as a "public works or public services contract". The concept of "concession" is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment.

10. The assessment of the elements in these definitions must, in the view of the Court, be made in such a way as to ensure that the Directive is not deprived of practical effect.[13] For example, the formalism attached to the concept of contract under national law cannot be advanced to deprive the Directives of their practical effect. Similarly, the pecuniary nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic consideration received by the private partner.

11. The contracts denoted as public works or public services contracts, defined as having priority,[14] are subject to the detailed provisions of Community Directives. The concessions of so-called "non-priority" works and public services contracts are governed only by some sparse provisions of secondary legislation. Lastly, some projects, and in particular services concessions, fall completely outside the scope of secondary legislation. The same is true of any assignment awarded in the form of a unilateral act.

12. The legislative framework governing the choice of private partner has thus been the subject of Community coordination at several levels and degrees of intensity, with a wide variety of approaches persisting at national level, even though any project involving the award of tasks to a third party is governed by a minimum base of principles deriving from Articles 43 to 49 of the EC Treaty.

13. The Commission has already taken initiatives under public procurement law to deal with the PPP phenomenon. In 2000 it published an Interpretive Communication on concessions and Community public procurement law,[15] in which it defined, on the basis of the rules and principles derived from the Treaty and applicable secondary legislation, the outlines of the concept of concession in Community law and the obligations incumbent on the public authorities when selecting the economic operators to whom the concessions are granted. In addition, the new Directives of the European Parliament and the Council designed to modernise and simplify the Community legislative framework, establish an innovative award procedure, designed principally to meet the specific features of the award of "particularly

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12 In PPPs, the public partners are primarily national, regional or local authorities. They may also be public law bodies created to fulfil general interest tasks under State control, or certain network system operators. To simplify matters, the term "contracting body" will be used in this document to designate all of these agencies. Thus this term covers "contracting authorities" within the meaning of Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 2004/18/EC and the contracting entities of the type "public authorities" and "public undertakings" within the meaning of Directives 93/38/EEC and 2004/17/EC.

13 Judgment of the Court of 12 July 2001, Case C-399/98, *Scala*, ECR I-5409, see in particular points 53 to 55.

14 i.e. those listed in Annex IA of Directive 92/50/EEC or Annex XVIA of Directive 93/38/EEC.

15 Interpretative Communication on concessions under Community law, OJ C 121, 29 April 2000.

complex contracts", and thereby certain forms of PPPs. This new procedure, designated as "competitive dialogue", allows the public authorities to hold discussions with the applicant businesses in order to identify the solutions best suited to their needs.

14. The fact remains that many representatives of interested groups consider that the Community rules applicable to the choice of businesses called on to cooperate with a public authority under of a PPP, and their impact on the contractual relationships governing the execution of the partnership, are insufficiently clear and lack homogeneity between the different Member States. Such a situation can create a degree of uncertainty for Community players that is likely to represent a genuine obstacle to the creation or success of PPPs, to the detriment of the financing of major infrastructure projects and the development of quality public services.

15. The European Parliament invited the Commission to examine the possibility of adopting a draft Directive aimed at introducing homogeneous rules for the sector of concessions and other forms of PPPs.[16] The Economic and Social Committee also considered that such a legislative initiative was called for.[17]

16. In the context of its Strategy for the internal market 2003-2006,[18] the Commission announced that it would publish a Green Paper on PPPs and Community law on public procurement and concessions, in order to launch a debate on the best way to ensure that PPPs can develop in a context of effective competition and legal clarity. The publication of a Green Paper is also one of the actions planned under the European Initiative for Growth.[19] Lastly, it responds to certain requests made in the course of the public consultation on the Green Paper on services of general interest.[20]

1.3. Specific aim and plan of this Green Paper

17. The aim of this Green Paper is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when taking a decision to entrust a mission or task to a third party. This takes place downstream of the economic and organisational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgement regarding the decision to externalise the management of public services or not; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or to entrust it to a third party.

18. Put more clearly, this Green Paper aims to show the extent to which Community rules apply to the phase of selection of the private partner and to the subsequent

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16 Opinion of the European Parliament (first reading) on the proposal of the Commission, COM (2000) 275, 10.05.2002.

17 Opinion, ESC, OJ C 14, 16.1.2001, rapporteur Mr Levaux, point 4.1.3 and Opinion, ESC, OJ C 193, 10.07.2001, rapporteur Mr Bo Green, point 3.5.

18 Strategy for the internal market, Priorities 2003-2006, COM (2003) 238 final.

19 Communication from the Commission "A European initiative for growth: Investing in networks and knowledge for growth and jobs", COM (2003) 690 final, 11 November 2003. This report was approved by the Brussels European Council on 12 December 2003.

20 See Report on the results of the consultation on the Green Paper on general interest services. See above, footnote 5.

phase, with a view to identifying any uncertainties, and to analyse the extent to which the Community framework is suited to the imperatives and specific characteristics of PPPs. Avenues of consideration for possible Community intervention will be outlined. Since the aim of this Green Paper is to launch a consultation, no option for Community intervention has been decided on in advance. Indeed, a wide variety of instruments are available to make PPPs more open to competition in a transparent legal environment, i.e. legislative instruments, interpretative communications, actions to improve the coordination of national practice or the exchange of good practice between Member States.

19. Thus, while this Paper focuses on issues covered by the law on public contracts and concessions, it should be noted that the Commission has already adopted measures, in certain fields, designed to remove barriers to PPPs. Thus, there has already been clarification of the rules on the treatment in the national accounts of contracts entered into by public entities under partnerships with private entities.[21] Note also that the adoption of the statute for a European company will facilitate trans-European PPPs.[22]

20. As part of the analysis of this Green Paper, it is proposed to make a distinction between:

- PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and
- PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity.

This distinction is based on the observation that the diversity of PPP practices encountered in the Member States can be traced to two major models. Each of these raise specific questions regarding the application of Community law on public contracts and concessions, and merit separate study, as undertaken in the following chapters.[23]

2. PURELY CONTRACTUAL PPPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

21. The term "purely contractual PPP" refers to a partnership based solely on contractual links between the different players. It covers a variety of set-ups where one or more tasks of a greater or lesser magnitude are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.

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21 See above, footnote 3.

22 Council Regulation (EC) No 2157/2001, 8 October 2001.

23 The distinction thus made does not take account of the legal interpretations made under national law and in no way prejudges the interpretation in Community law of these types of set-ups or contracts. The sole purpose of the analysis which follows is to make a distinction between the set-ups generally termed PPPs, in order to decide, in a second phase, which rules of Community law on public contracts and concessions should apply to them.

22. In this context, one of the best-known models, often referred to as the "concessive model",[24] is characterised by the direct link that exists between the private partner and the final user: the private partner provides a service to the public, "in place of", though under the control of, the public partner. Another feature is the method of remuneration for the joint contractor, which consists of charges levied on the users of the service, if necessary supplemented by subsidies from the public authorities.

23. In other types of set-up, the private partner is called on to carry out and administer an infrastructure for the public authority (for example, a school, a hospital, a penitential centre, a transport infrastructure). The most typical example of this model is the PFI set-up.[25] In this model, the remuneration for the private partner does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner. These payments may be fixed, but may also be calculated in a variable manner, on the basis, for example, of the availability of the works or the related services, or even the level of use of the works. [26]

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

2.1. Phase of selection of the private partner

2.1.1. Purely contractual partnership: act of award designated as a "public contract"

24. The arrangements applicable to the award of public works contracts or public services contracts defined as having priority[27] result from the provisions of the Community Directives laying down detailed rules particularly relating to advertising and participation. When the public authority is a contracting authority acting under the "classical" Directives,[28] it must normally have recourse to the open or restricted procedure to choose its private partner. By way of exception, and under certain conditions, recourse to the negotiated procedure is sometimes possible. In this context, the Commission wishes to point out that the derogation under Article 7(2) of Directive 93/37/EEC, which provides for recourse to negotiated procedure in the case of a contract when "the nature of the works or the risks attaching thereto do not permit prior overall pricing", is of limited scope. This derogation is to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.[29]

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24 It should be noted that the interpretation given by national law or by the parties has no impact on the legal interpretation of these contracts for the purposes of the application of a Community law on public contracts and concessions.

25 The term PFI refers to "Private Finance Initiative", a programme of the British Government permitting the modernisation of the public infrastructure through recourse to private funding. The same model is used in other Member States, sometimes with major variants. For example, the PFI model inspired the development of the "Betreibermodell" in Germany.

26 See the case of "virtual tolls", used in the context of motorway projects, particularly in the United Kingdom, Portugal, Spain and Finland.

27 i.e. those listed in Annex IA of Directive 92/50/EEC and Annex XVIA of Directive 93/38/EEC.

28 i.e. Directives 93/37/EEC, 92/50/EEC and 2004/18/EC.

29 For example, it may apply when the works are to be carried out in a geologically unstable or archaeological terrain and for this reason the extent of the necessary work is not known when launching

25. Since the adoption of Directive 2004/18/EC, a new procedure known as "competitive dialogue" may apply when awarding particularly complex contracts.[30] The competitive dialogue procedure is launched in cases where the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and/or financial form of a project. This new procedure will allow the contracting bodies to open a dialogue with the candidates for the purpose of identifying solutions capable of meeting these needs. At the end of this dialogue, the candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project. The contracting authorities must assess the tenders on the basis of the pre-stated award criteria. The tenderer who has submitted the most economically advantageous tender may be asked to clarify aspects of it or confirm commitments featuring therein, provided this will not have the effect of altering fundamental elements in the tender or invitation to tender, of falsifying competition or of leading to discrimination.

26. The competitive dialogue procedure should provide the necessary flexibility in the discussions with the candidates on all aspects of the contract during the set-up phase, while ensuring that these discussions are conducted in compliance with the principles of transparency and equality of treatment, and do not endanger the rights which the Treaty confers on economic operators. It is underpinned by the belief that structured selection methods should be protected in all circumstances, as these contribute to the objectivity and integrity of the procedure leading to the selection of an operator. This in turn guarantees the sound use of public funds, reduces the risk of practices that lack transparency and strengthens the legal certainty necessary for such projects.

27. In addition, note that the new Directives emphasise the benefit to the contracting bodies of formulating the technical specifications in terms of either performance or functional requirements. New provisions will thus give the contracting bodies more scope to take account of innovative solutions during the award phase, irrespective of the procedure adopted.[31]

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

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the tender procedure. A similar derogation is provided for in Article 11(2) of Directive 92/50, and in Article 30(1)(b) of Directive 2004/18/EC.

30 Article 29 of Directive 2004/18/EC.

31 Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

2.1.2. Purely contractual partnership: act of award designated as a "concession"

28. There are few provisions of secondary legislation which coordinate the procedures for the award of contracts designated as concession contracts in Community law. In the case of works concessions, there are only certain advertising obligations, intended to ensure prior competition by interested operators, and an obligation regarding the minimum time-limit for the receipt of applications.[32] The contracting bodies are then free to decide how to select the private partner, although in so doing they must nonetheless guarantee full compliance with the principles and rules resulting from the Treaty.

29. For their part, the rules governing the award of services concessions apply only by reference to the principles resulting from Articles 43 and 49 of the Treaty, in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.[33] In its *Telaustria* Judgment, the Court stated in this respect that "*[the] obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed*".[34]

30. The Commission considers that the rules resulting from the relevant provisions of the Treaty can be summed up in the following obligations: fixing of the rules applicable to the selection of the private partner, adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure, introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question, compliance with the principle of equality of treatment of all participants throughout the procedure, selection on the basis of objective, non-discriminatory criteria.

31. Thus the Community law applicable to the award of concessions is derived primarily from general obligations which involve no coordination of the legislation of Member States. In addition, and although the Member States are free to do so, very few have opted to adopt national laws to lay down general and detailed rules governing the award of works or services concessions.[35] Thus, the rules applicable to the selection of a concessionaire by a contracting body are, for the most part, drawn up on a case-by-case basis.

32. This situation may present problems for Community operators. The lack of coordination of national legislation could in fact be an obstacle to the genuine

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32 See Article 3(1) of Directive 93/37/EEC, and Articles 56 to 59 of Directive 2004/18/EC.

33 Although the Commission had proposed that services concessions be included in Directive 92/50/EEC, in the course of the legislative process the Council decided to exclude them from the scope of that Directive.

34 Case C-324/98. See also ruling of 30 May 2002, Case C-358/00, *Deutsche Bibliothek,* ECR. I-4685. These principles are also applicable to other State acts entrusting an economic service to a third party, as for example the contracts excluded from the scope of the Directives owing to the fact that they have a value below the threshold values laid down in the secondary legislation (Order of the Court of 3 December 2001, Case C-59/00, *Vestergaard*, ECR. I-9505), or so-called non-priority services.

35 Spain (law of 23 May 2003 on works concessions), Italy (Merloni law of 1994, as amended) and France (Sapin law of 1993) have nonetheless adopted such legislation.

opening up of such projects in the Community, particularly when they are organised at transnational level. The legal uncertainty linked to the absence of clear and coordinated rules might in addition lead to an increase in the costs of organising such projects.

33. Moreover, some persons have claimed that the objectives of the internal market might not be achieved in certain situations, owing to a lack of effective competition on the market. In this context the Commission wishes to recall that the "public contracts" Directives aim not only to ensure transparency of procedures and equality of treatment for economic operators, but also require that a minimum number of candidates be invited to participate in the procedures, whether these be open, restricted, negotiated, or competitive dialogue procedures.[36] There is a need to assess whether the effective application of these provisions is sufficient, or whether other measures are needed to facilitate the emergence of a more competitive environment.

34. The Commission has also observed, in the context of infringement procedures already investigated, that it is not always easy to determine from the outset if the contract which is the subject-matter of the procedure is a public contract or a concession. Indeed, in the case of contracts designated as concessions when the procedure is launched, the distribution of risks and benefits may be the subject of negotiations throughout the procedure. It may occur that, following these negotiations, the contract in question must in the end by redefined as a "public contract", resulting often in a calling into question of the legality of the award procedure selected by the contracting body. According to the views expressed by the parties concerned, this situation creates a degree of legal uncertainty which is very damaging to the development of such projects.

35. In this context, the Commission could envisage proposing legislative action designed to coordinate the procedures for the award of concessions in the European Union, such new legislation being added to the existing texts on the award of public contracts. In that case it would be necessary to lay down the detailed provisions applicable to the award of concessions.

36. Also, there are grounds to examine if there are objective reasons for making the award of concessions and the award of other contractual PPPs subject to different sets of provisions. In this context, it should be noted that it is the criterion of the right of exploitation and its corollary, the transfer of the risks inherent in the exploitation, which distinguish public contracts from concessions. If it is confirmed that legal uncertainty, linked to the difficulty of identifying a priori the distribution of the risks of exploitation between the partners, arises frequently when awarding certain purely contractual PPPs, the Commission might consider making the award of all contractual PPPs, whether designated as public contracts or concessions, subject to identical award rules.

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[36] Article 19 of Directive 93/36/EEC, Article 22 of Directive 93/37/EEC, Article 27 of Directive 92/50/EEC and Article 31 of Directive 93/38/EEC. See also Article 44 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?
5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?
6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?
7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

2.2. Specific questions relating to the selection of an economic operator in the framework of a private initiative PPP

37. Certain practices where the private sector has the opportunity to take the initiative in a PPP project have recently been developed in some Member States.[37] In arrangements of this type, the economic operators formulate a detailed proposal for a project, generally in the field of construction and infrastructure management, in some cases at the invitation of the public authority.

38. Such practices make it possible to sound out at an early stage the willingness of economic operators to invest in certain projects. They also encourage them to develop or apply innovate technical solutions, suited to the particular needs of the contracting body.

39. The fact that a public utility project originates in a private initiative does not change the nature of the contracts concluded between the contracting bodies and the economic operators. Where these contracts concern services covered by secondary legislation and are concluded for pecuniary interest, they must be designated either as a contract or a concession and adhere to the resulting award rules.

40. It is therefore necessary to ensure that the procedures applied in this context do not end up depriving European economic operators of the rights to which the Community legislation on public contracts and concessions entitles them. In particular, and at the very least, the Commission is of the view that all European operators must be guaranteed access to such projects, primarily through adequate advertising of the invitation to formulate a project. Subsequently, if the public authority wishes to implement a given project, it must organise a call for competition addressed to all the economic operators who are potentially interested in developing the selected project, providing full guarantees of the impartiality of the selection process.

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[37] In certain Member States, the private initiative is subject to specific supervision (see in Italy the Merloni law of 18 November 1998 and, in Spain, the regulation on local authority services of 1955 and the law 13/2003 on works concessions of 23 May 2003). In other Member States, the private initiative PPP is also emerging in practice.

41. To make the system attractive, the Member States have sometimes tried to provide certain incentives for first movers. The option of compensating the initiator of the project – for example, paying him for his initiative outside of the subsequent call for competition procedure – has been used. The possibility was also envisaged of awarding the first mover certain advantages in the context of the call for competition designed to develop the selected project. Such solutions merit close consideration, to ensure that these competitive advantages awarded to the project mover do not breach the equality of treatment of candidates.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?
9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

2.3. The phase following the selection of the private partner

42. Community secondary legislation on public contracts and concessions mainly concerns the phase of award of a contract. Secondary legislation does not cover comprehensively the phase following selection of the private partner. However, and the principle of equality of treatment and the principle of transparency resulting from the Treaty generally rule out any intervention of the public partner after selection of a private partner, in so far as any such intervention might call into question the principle of equality of treatment between economic operators.[38]

43. The often complex nature of the arrangements in question, the time which may elapse between the selection of the private partner and the signing of the contract, the relatively long duration of the projects and, lastly, the frequent recourse to sub-contracting mechanisms, sometimes complicate the application of these rules and principles. Two aspects are covered below: the contractual framework of the PPP and sub-contracting.

2.3.1. The contractual framework of the project

44. The contractual provisions governing the phase of implementation of the PPPs are primarily those of national law. However, contractual clauses must also comply with the relevant Community rules, and in particular the principles of equality of treatment and transparency. This implies in particular that the descriptive documents must formulate clearly the conditions and terms for performance of the contract so that the various candidates for the partnership can interpret them in the same manner and take them into account when preparing their tenders. In addition, these terms and conditions of performance must not have any direct or indirect discriminatory impact or serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment.[39]

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[38] See Case C-87/94, *Commission v. Belgique* (*Bus Wallons),* Judgment of 25 April 1994, point 54. See also Case C-243/89, *Commission v. Danemark (Bridge on the Storebaelt),* Judgment of 22 June 1992.

[39] Case C-19/00, *SIAC Constructions*, Judgment of 18 October 2001, points 41-45; Case C-31/87, *Gebroeders Beentjes v. Pays-Bas*, Judgment of 20 September 1988, points 29-37. See also Article 26 of Directive 2000/18/EC and Article 38 of Directive 2000/17/EC.

45. The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial. Also important are mechanisms to evaluate the performance of the titular holder of the PPP on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders.

46. In addition, the period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project. In particular, the duration of the partner relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital. An excessive duration is likely to be censured on the basis of the principles governing the internal market[40] or the provisions of the Treaty governing competition.[41] Similarly, the principle of transparency requires that the elements employed to establish the duration be communicated in the descriptive documents so that tenderers can take them into account when preparing their tenders.

47. Since they concern a service spread out in time, PPP relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements. In general, Community public contract law does not reject such a possibility, as long as this is done in compliance with the principles of equality of treatment and transparency. Thus, the descriptive documents transmitted to the tenderers or candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship. However, such clauses must always be sufficiently clear to allow the economic operators to interpret them in the same manner during the partner-selection phase.

48. In certain projects, the financial institutions reserve the right to replace the project manager, or to appoint a new manager, if the financial flows generated by the project fall below a certain level. The implementation of such clauses, which fall within the category of so-called "step-in" clauses, may result in changing the private partner of the contracting body without a call for competition. Consequently, to guarantee the compatibility of such projects with Community law on public contracts and concessions, special attention must be paid to this aspect.

49. In general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators.[42] Such unregulated modifications are

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40 See Interpretative Communication on concessions, in particular point 3.1.3.

41 Articles 81, 82 and 86 (2) of the EC Treaty.

42 See Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. Community law also rejects any changes made during the phase of drawing up the contract, after the final selection of the successful tenderer. In this respect the new provisions governing competitive dialogue stipulate that

therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health.[43] In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition.[44]

50. Lastly, it should be pointed out that secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered or in the initial contract may be awarded directly, without a call for competition.[45] The interpretation of these exceptions must be restrictive. For example, they do not refer to the extension of the period of an already existing motorway concession, in order to cover the cost of works to complete a new section. Thus, the practice of combining "profitable" and "non-profitable" activities awarded to a single concessionaire must not lead to a situation where a new activity is awarded to an existing concessionaire without competition.

10. In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

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the successful tenderer may only "clarify aspects of the tender or confirm commitments contained in the tender, provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender or does not risk distorting competition or causing discrimination".

43 Article 46 of the Treaty.

44 Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. The Interpretative Communication on concessions states in this context that the extension of an existing concession beyond the period originally laid down must be considered equivalent to granting a new concession to the same concessionaire.

45 See Article 11 (3)(e) of Directive 92/50/EEC, Article 7 (3)(d) of Directive 93/37/EEC and Article 20 (2)(f) of Directive 93/38/EEC. The new Directive 2004/18/EC provides for a similar exception for works concessions, see Article 61.

2.3.2. Sub-contracting of certain tasks

51. It is the Commission's experience that the application of subcontracting rules sometimes gives rise to uncertainties or queries in the context of PPP arrangements. Certain parties have claimed, for example, that the contractual relations between the project company, which becomes the holder of the contract or the concession, and its shareholders, raise a certain number of legal issues. In this respect, the Commission wishes to point out that when the project company is itself in the role of contracting body, it must conclude its contracts or concession contracts in the context of a competition, whether or not these are concluded with its own shareholders. The only case where this does not apply is when the services entrusted by a project company to its shareholders have already been the subject of a competition by the public partner prior to the formation of the company undertaking the project.[46] However, when this company is not in the role of contracting body, it is in principle free to conclude contracts with third parties, whether these be its own shareholders or not. By way of exception, when the project company is a "works concessionaire", certain publicity requirements apply to the award of works contracts exceeding a threshold of EUR 5 million, with the exception of contracts concluded with businesses that have formed a group in order to win the concession, or their affiliated companies.[47]

52. In principle, private partners are free to subcontract part or all of a public contract or a concession. However, it should be pointed out that, in the case of the award of public contracts, tenderers may be asked to indicate in their tenders the share of the contract which they intend to subcontract to third parties.[48] In the case of public works concessions where the value exceeds EUR 5 million, the contracting body may require the concessionaire to award contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded to third parties.[49]

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

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46 Article 13 of Directive 93/38/EEC provides for a derogation when the sub-contracting contracts for services are awarded by a network systems operator acting as contracting entity to an affiliated enterprise. Article 23 of Directive 2004/17/EC extends this exception to sub-contracting contracts covering supplies or works.

47 Article 3 (4) of Directive 93/37/EEC and Articles 63 to 65 of Directive 2004/18/EC. In the latter articles the above-mentioned threshold is fixed at EUR 6 242 000.

48 Article 17 of Directive 93/36/EEC, Article 20 of Directive 93/37/EEC, Article 25 of Directive 92/50, Article 27 of Directive 93/38. See also Article 25 of Directive 2004/18/EC and Article 37 of Directive 2004/17/EC.

49 Article 3(2) of Directive 93/37/EEC. See also Article 60 of Directive 2004/18/EC.

3. INSTITUTIONALISED PPPS AND THE COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

53. Within the meaning of this Green Paper, institutionalised PPPs involve the establishment of an entity held jointly by the public partner and the private partner.[50] The joint entity thus has the task of ensuring the delivery of a work or service for the benefit of the public. In the Member States, public authorities sometimes have recourse to such structures, in particular for to administer public services at local level (for example, for water supply services or waste collection services).

54. Direct cooperation between the public partner and the private partner in a forum with a legal personality allows the public partner, through its presence in the body of shareholders and in the decision-making bodies of the joint entity, to retain a relatively high degree of control over the development of the projects, which it can adapt over time in the light of circumstances. It also allows the public partner to develop its own experience of running the service in question, while having recourse to the support of a private partner.

55. An institutionalised PPP can be put in place, either by creating an entity held jointly by the public sector and the private sector (3.1), or by the private sector taking control of an existing public undertaking (3.2).

56. The discussion below focuses solely on issues concerning the law on public contracts and concessions applicable to institutionalised PPPs. For a more general discussion of the impact of this law when setting up and executing such PPPs, please refer to the preceding chapters.

3.1. Partnership involving the creation of an ad hoc entity held jointly by the public sector and the private sector.[51]

57. The law on public contracts and concessions does not of itself apply to the transaction creating a mixed-capital entity. However, when such a transaction is accompanied by the award of tasks through an act which can be designated as a public contract, or even a concession, it is important that there be compliance with the rules and principles arising from this law (the general principles of the Treaty or, in certain cases, the provisions of the Directives).[52]

58. The selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the

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50 The Member States use different terminology and schemes in this context (for example, the Kooperationsmodell, joint PPPs, Joint Ventures).

51 The question being dealt with here is the creation of *ex novo* entities in the context of a specific legal arrangement. However, the case of pre-existing mixed entities participating in the procedures for the award of public contracts or concessions will not be dealt with specifically, because this latter hypothesis does not give rise to much comment in terms of the applicable Community law. The mixed character of an entity participating in a tendering procedure does not in fact involve any derogation from the rules applicable to the award of a public contract or a concession. Only in the case where the entity in question meets the characteristics of an 'in house' entity, within the meaning of the *Teckal Case* Law of the Court of Justice, is the contracting authority entitled not to apply the usual rules.

52 Note that the principles governing the law on public contracts and concessions apply also when a task is awarded in the form of a unilateral act (e.g. a legislative or regulatory act).

characteristics of its offer – the most economically advantageous – in terms of the specific services to be provided. Thus, in the absence of clear and objective criteria allowing the contracting authority to select the most economically advantageous offer, the capital transaction could constitute a breach of the law on public contracts and concessions.

59. In this context, the transaction involving the creation of such an entity does not generally present a problem in terms of the applicable Community law when it constitutes a means of executing the task entrusted under a contract to a private partner. However, the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks which one wishes to entrust to the private partner.[53]

60. However, the Commission has noted that, in certain Member States, national legislation allows the mixed entities, in which the participation by the public sector involves the contracting body, to participate in a procedure for the award of a public contract or concession even when these entities are only in the course of being incorporated. In this hypothesis, the entity will be definitively incorporated only after the contract has actually been awarded to it. In other Member States, a practice has developed which tends to confuse the phase of incorporating the entity and the phase of allocating the tasks. Thus the purpose of the procedure launched by the contracting authority is to create a mixed entity to which certain tasks are entrusted.

61. Such formulae do not appear to offer satisfactory solutions in terms of the provisions applicable to public contracts and concessions.[54] In the first case, there is a risk that the effective competition will be distorted by a privileged position of the company being incorporated, and consequently of the private partner participating in this company. In the second case, the specific procedure for selecting the private partner also poses many problems. The contracting authorities encounter certain difficulties in defining the subject-matter of the contract or concession in a sufficiently clear and precise manner in this context, as they are obliged to do. The Commission has frequently noted that the tasks entrusted to the partnership structure are not clearly defined and that, in certain cases, they even fall outside any contractual framework. This raises problems not only with regard to the principles of transparency and equality of treatment, but even risks prejudicing the general interest objectives which the public authority wishes to attain. It is also evident that the lifetime of the created entity does not generally coincide with the duration of the contract or concession awarded, and this appears to encourage the extension of the task entrusted to this entity without a true competition at the time of this renewal. Sometimes this results in a situation where the tasks are awarded *de facto* for an unlimited period.

62. In addition, it should be pointed out that the joint creation of such entities must respect the principle of non-discrimination in respect of nationality in general and the

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53 Also, these conditions must not discriminate against or constitute an unjustified barrier to the freedom to provide services or to freedom of establishment, or be disproportionate to the desired objective.

54 When planning and arranging such transactions, the test involving the use of the standard forms - which include the elements indispensable for a well-informed competition, - also demonstrate how difficult it can be to find an adequate form of advertising to award tasks falling within the scope of the law on public contracts or concessions.

free circulation of capital in particular.[55] Thus, for example, the public authorities cannot normally make their position as shareholder in such an entity contingent on excessive privileges which do not derive from a normal application of company law.[56]

63. The Commission also wishes to point out that the participation of the contracting body in the mixed entity, which becomes the joint holder of the contract at the end of the selection procedure, does not justify not applying the law on public contracts and concessions when selecting the private partner. The application of Community law on public contracts and concessions is not contingent on the public, private or mixed character of the joint contractor of the contracting body. As the Court of Justice confirmed in the *Teckal* case, this law is applicable when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out *the essential part of its activities* with the controlling local authority or authorities.[57] Only entities that fulfil these two conditions at the same time may be treated as equivalent to "in-house" entities in relation to the contracting body and have tasks entrusted to them without a competitive procedure.[58]

64. Lastly, it should be pointed out that if the mixed entity has the quality of a contracting body this quality also requires it to comply with the law applicable to public contracts and concessions when it is awarding tasks to the private partner which have not been the subject of a call for competition by the contracting authority ahead of the incorporation of the mixed entity. Thus, the private partner should not profit from its privileged position in the mixed entity to reserve for itself certain tasks without a prior call for competition.

3.2. Control of a public entity by a private operator

65. The establishment of an institutionalised PPP may also lead to a change in the body of shareholders of a public entity. In this context, it should first be emphasised that the changeover of a company from the public sector to the private sector is an economic and political decision which, as such, falls within the sole competence of the Member States.[59]

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55 Participation in a new undertaking with a view to establishing lasting economic links is covered by the provisions of Article 56 relating to the free movement of capital. See Annex I of Directive 88/361/EEC, adopted in the context of the former Article 67, which lists the types of operations which must be considered as movements of capital.

56 See Judgments of the Court of 4 June 2002, Case C-367/98, *Commission v. Portugal*, ECR I-4731; Case C-483/99, *Commission v. France*, ECR I-4781; and Judgments of 13 May 2003, Case C-463/00, *Commission v. Spain,* ECR. I-4581; Case C-98/01, *Commission v. United Kingdom,* Rec. I-4641. On the possible justifications in this framework, see Judgment of the Court of 4 June 2002, Case C-503/99, *Commission v. Belgium*, ECR I-4809.

57 Case C-107/98, *Teckal*, Judgment of 18 November 1999, point 50.

58 The Court of Justice has been asked to make three preliminary rulings (Cases C-26/03, C-231/03 and C-458/03) designed to obtain additional clarification on the scope of the criteria which can establish the existence of an "in house" type relationship.

59 This follows from the neutrality principle of the Treaty in relation to ownership rules, recognised by Article 295 of the Treaty.

66. It should also be pointed out that Community law on public contracts is not as such intended to apply to transactions involving simple capital injections by an investor in an enterprise, whether this latter be in the public or the private sector. Such transactions fall under the scope of the provisions of the Treaty on the free movement of capital[60], implying in particular that the national measures regulating them must not constitute barriers to investment from other Member States.[61]

67. On the other hand, the provisions on freedom of establishment within the meaning of Article 43 of the Treaty must be applied when a public authority decides, by means of a capital transaction, to cede to a third party a holding conferring a definite influence in a public entity providing economic services normally falling within the responsibility of the State.[62]

68. In particular, when the public authorities grant an economic operator a definite influence in a business under a transaction involving a capital transfer, and when this transaction has the effect of entrusting to this operator tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment, in order to ensure that every potential operator has equal access to performing those activities which had hitherto been reserved.

69. In addition, good practice recommends ensuring that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts, even concessions. This is the case in particular when, before the capital transaction, the entity in question is awarded, directly and without competition, specific tasks, with a view to making the capital transaction attractive.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?
19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?

In general and independently of the questions raised in this document:

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?
21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.
22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

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60 Article 56 ff. of the EC Treaty.

61 See Communication of the Commission on certain legal aspects concerning intra-EU investment OJ No C 220, 19 July 1997, p.15.

62 See, on these lines, the Judgment of the Court of 13 April 2000, Case C-251/98, *Baars*, ECR I-2787

4. FINAL REMARKS

70. The Commission invites all interested parties to send their comments on the questions set out in this Green Paper. The replies, comments and suggestions may be sent by mail to the following address:

European Commission
Consultation "Green Paper on PPPs and the Community law on public contracts and concessions"
C 100 2/005
B-1049 Brussels

or by electronic mail to the following address:

MARKT-D1-PPP@cec.eu.int

Comments should reach the Commission by **30 July 2004** at the latest. For the information of interested parties, contributions received by electronic mail, with the name and address of the originators, will be posted at the site *http://europa.eu.int/comm/internal_market*, provided that the authors in question have not expressly objected to such publication.

71. On the basis of the contributions received, *inter alia*, the Commission plans to draw conclusions and, where appropriate, to submit concrete follow-up initiatives.

Abstract:

Contents: 14 Subsection(s) - 0 document(s)

List items containing in Any Field

	Title+	Items	Size	Version	Language	Issue Date
	Previous Section					
	Austria	7				
	Belgium	1				
	EC level	4				
	Finland	1				
	France	3				
	Germany	3				
	Ireland	1				
	Poland	2				
	Portugal	1				
	Slovak Republic	1				
	Spain	1				
	Sweden	1				
	The Netherlands	2				
	United Kingdom	3				

Abstract:

Contents: 12 Subsection(s) - 0 document(s)

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Abstract:

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	France	16				
	Germany	2				
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Abstract:

Contents: 8 Subsection(s) - 0 document(s)

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Previous Section					
Finland	1				
Germany	1				
Ireland	1				
Italy	2				
Lithuania	1				
Poland	2				
Portugal	1				
United Kingdom	3				

Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)

(Text with EEA relevance)

(2008/C 91/02)

1. INTRODUCTION

In recent years, Public-Private Partnerships (PPP) have developed in many fields. The hallmark of this form of cooperation, which is generally geared to the longer term, is the role of the private partner, who is involved in the various phases of the project (planning, implementation and operation), who is intended to bear risks that are traditionally borne by the public sector and who often contributes to financing the project.

Under Community law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a PPP. However, if public bodies decide to involve third parties in economic activities and if this involvement qualifies as a public contract or a concession, the Community provisions for public procurement and concessions must be complied with. The aim of these provisions is to enable all interested economic operators to tender for public contracts and concessions on a fair and transparent basis in the spirit of the European internal market, thereby enhancing the quality of such projects and cutting their costs by means of increased competition ([1]).

The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions ([2]) showed ([3]) that there was considerable need for clarification on the application of these rules to so-called 'institutionalised' PPP (IPPP). IPPP are understood by the Commission as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions ([4]). The private input to the IPPP consists — apart from the contribution of capital or other assets — in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies, do not constitute IPPP and are therefore not covered by the present Communication.

The perceived lack of legal certainty in relation to the involvement of private partners for IPPP may undermine the success of such projects. The risk of establishing structures based on contracts which might subsequently turn out to be non-compliant with EC law may discourage public authorities or private parties from entering into IPPP at all.

The European Parliament, in its Resolution on Public-Private Partnerships of 26 October 2006 ([5]), acknowledged that practitioners want clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession, and it called on the Commission to provide the relevant clarifications at the earliest opportunity.

The present Communication sheds light on the Commission's understanding of how the Community provisions on public procurement and concessions ([6]) are to be applied to the founding and operation of IPPP ([7]). The Communication aims at enhancing legal certainty and, in particular, assuaging repeatedly expressed

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([1]) The European Parliament noted in this connection that compliance with these rules 'can be an effective mechanism for preventing inappropriate restrictions on competition by enabling, at the same time, the public authorities themselves to lay down and monitor conditions for ensuring quality, availability, social standards and compliance with environmental requirements' (European Parliament Resolution on the Green Paper on Services of General Interest [P5_TA(2004)0018], paragraph 32).

([2]) COM(2004) 327 of 30 April 2004.

([3]) Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM(2005) 569 of 15 November 2005, page 9.

([4]) The Member States use different terminology and schemes in this context (for instance Kooperationsmodell, Joint Ventures, Sociétés d'Economie Mixte).

([5]) P6_TA(2006)0462, paragraph 35.

([6]) 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment; 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment (see Article 1 paragraph 2(3) and (4) of Directive 2004/18/EC (OJ L 134, 30.4.2004, p. 114)).

([7]) The present Communication does not cover those public service contracts and service concessions to which Article 5 paragraphs 2 to 7 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1) apply.

concerns that applying Community law to the involvement of private partners into IPPP would make these arrangements unattractive or even impossible. The present Communication is part of the Commission's commitment to provide legal guidance in the area of services of general interest as set out in the Commission Communication on services of general interest, including social services of general interest ([8]) of 20 November 2007.

This Communication does not create any new legislative rules. It reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and the relevant case-law of the European Court of Justice (ECJ). It should be noted that, in any event, the binding interpretation of Community law is ultimately the role of the ECJ.

2. **THE FOUNDING OF AN IPPP**

2.1. **Principles**

At Community level there are no specific rules governing the founding of IPPP. However, in the field of public procurement and concessions, the principle of equal treatment and the specific expressions of that principle, namely the prohibition of discrimination on grounds of nationality and Articles 43 EC on freedom of establishment and 49 EC on freedom to provide services, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party ([9]). More specifically, the principles arising from Article 43 EC and Article 49 EC include not only non-discrimination and equality of treatment, but also transparency, mutual recognition and proportionality ([10]). For cases which are covered by the Directives on the coordination of procedures for the award of public contracts ([11]) ('the Public Procurement Directives'), detailed provisions apply.

The fact that a private party and a contracting entity ([12]) co-operate within a public-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity. In fact, the ECJ held ([13]) that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant excludes in any event the possibility of an in-house relationship — to which, in principle, public procurement law does not apply — between that contracting entity and that company ([14]).

2.2. **The founding process**

In practice, an IPPP is usually set up:

— either by founding a new company, the capital of which is held jointly by the contracting entity and the private partner — or, in certain cases, by several contracting entities and/or several private partners — and awarding a public contract or a concession to this newly founded public-private entity,

— or by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions 'in-house' in the past.

([8]) COM(2007) 725 of 20 November 2007; see also the Commission Staff Working Document 'Frequently asked questions concerning the application of public procurement rules to social services of general interest' SEC(2007) 1514 accompanying the Communication of 20 November 2007.

([9]) Case C-458/03, Parking Brixen, ECR 2005, I-8612, paragraph 61.

([10]) Cf. Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 6).

([11]) Directive 2004/18/EC, see footnote 6 above, and Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1).

([12]) In this Communication the term 'contracting entity' covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

([13]) Case C-26/03, Stadt Halle, ECR 2005, I-1, paragraph 49.

([14]) According to the ECJ (Case C-410/04, ANAV, ECR 2006, I-3303, paragraphs 30 *et seq.*) it is not only the actual participation of a private party in the capital of a publicly owned company that excludes the in-house status of a publicly owned company, but also a contracting entity's intent to open up the capital of its daughter company to private third parties in the future. Thus, public contracts or concessions could not be awarded 'in-house' to publicly owned companies the capital of which is intended to be opened to private parties in the course of the performance of the respective public contracts or concessions. Conversely, the theoretical possibility of a private party participating in the capital of a public authority's subsidiary does not, as the Commission sees it, in itself undermine the in-house relationship between the contracting entity and its company.

Irrespective of how the IPPP is set up, Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP ([15]), or when granting a public contract or a concession to the public-private entity ([16]). It is important to note that public authorities are not permitted 'to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies' ([17]).

In any case, the Commission does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical.

One possible way of setting up an IPPP, which is, in the Commission's view, suitable for complying with the principles of Community law while at the same time avoiding a double tendering procedure, is as follows: The private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession ([18]) which is to be awarded to the future public-private entity, and the private partner's operational contribution to perform these task and/or his contribution to the management of the public-private entity. The selection of the private partner is accompanied by the founding of the IPPP and the award of the contract or concession to the public-private entity.

2.3. **The selection of private partners for IPPP**

2.3.1. *Legal basis*

If the task assigned to the public-private entity is a public contract fully covered by the Public Procurement Directives, the procedure for selecting the private partner is determined by these Directives. If the task is a works concession or a public contract that is only partially covered by the Directives, the fundamental principles derived from the EC Treaty apply in addition to the relevant provisions of the Directives. In case of services listed in Annex II B of Directive 2004/18/EC the fundamental principles of the EC Treaty as set out in Articles 43 and 49 apply if these contracts can be expected to be of certain interest to undertakings located in a different Member State to that of the relevant contracting entity ([19]). Finally, if it is a service concession or a public contract not covered by the Directives, the selection of the private partner has to comply with the principles of the EC Treaty.

The case law cited in this document refers in part to public contracts that are fully covered by the Public Procurement Directives. However, since this case law is often based on principles of the EC Treaty it may also be pertinent when applying Community law to other situations, such as concessions or to public contracts that are not, or not fully, covered by the Directives ([20]).

2.3.2. *Procurement Procedure*

If the founding of an IPPP involves the award of a public contract fully covered by Directive 2004/18/EC to a public-private entity, the open and restricted procedures defined in that Directive may, due to the particular

([15]) A fair and transparent selection of the private partner of an IPPP ensures that the objective of free and undistorted competition is met and the principle of equal treatment is complied with, in particular by avoiding undue advantages of the private undertaking with a capital presence in the IPPP over its competitors. Thus, the founding of an IPPP via a fair and transparent selection of the private partner of this public-private entity meets the respective concerns expressed by the ECJ in Case C-26/03, Stadt Halle, see footnote 13 above, paragraph 51.

([16]) Contracting entities are entitled to award public contracts covered by Directive 2004/17/EC directly to their affiliated undertakings as defined in Article 23 of this Directive.

([17]) Case C-29/04, Commission v Austria, ECR 2005, I-9705, paragraph 42.

([18]) If the IPPP in question is set up by the participation of a private partner in an existing publicly owned company, the subject of the selection procedure of the private partner for this IPPP could be the award of public contracts or concessions which were performed 'in-house' by the respective publicly owned company in the past.

([19]) Case C-507/03, Commission v Ireland [2007], paragraph 32, not yet published in the ECR.

([20]) See for guidance on the award of these contracts Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2). A number of Member States and the European Parliament have asked the Court of First Instance to annul that Communication. At the time of the adoption of the present Communication the case is still pending before the Court of First Instance.

financial or legal complexity of such contracts, not offer sufficient flexibility. For cases like this, Directive 2004/18/EC introduced a new innovative procedure — the competitive dialogue ([21]) — the aim of which is not only to preserve competition between economic operators but also to take into account the contracting authorities' need to discuss all aspects of the contract with each candidate ([22]).

For the award of public contracts fully covered by Directive 2004/18/EC the negotiated procedure with publication of a contract notice can only be used in exceptional cases ([23]). Conversely, contracting entities could always resort to the negotiated procedure with publication of a contract notice when awarding concessions or public contracts other than those fully covered by Directive 2004/18/EC.

2.3.3. *Information about the project*

If the public task connected with the setting up of an IPPP falls within the scope of the Public Procurement Directives, or of sector-specific Community rules providing for public procurement obligations ([24]), special requirements for publication must be complied with ([25]). With regard to other public contracts and to service concessions, the principles of transparency and equal treatment arising from the EC Treaty ([26]) require potential bidders to have equal access to suitable information about the intent of a contracting entity to set up a public-private entity and to award it a public contract or a concession. Suitable information can best be guaranteed by publicising a notice that is sufficiently accessible to potentially interested parties before the private partner is selected.

2.3.4. *Permitted selection and award criteria and transparency requirements for the criteria*

In the Commission's view, Community law requires the contracting entity to publicise the selection and award criteria for identifying the private partner for the IPPP. The criteria used must comply with the principle of equal treatment. This applies both to public contracts fully covered by the Public Procurement Directives ([27]) and in the view of the Commission also to other public contracts and concessions. The choice of the tenderers or the candidates who will participate in the tendering procedure and the choice between the bids submitted must be made on the basis of these criteria, and the contracting entity needs to follow the procedural rules and basic requirements originally laid down ([28]).

The Public Procurement Directives specify objective requirements related to the personal capacity of the private partner, such as the personal situation of the candidate, his economic and financial standing, his suitability to pursue the professional activity in question and his technical and/or professional ability ([29]). Such criteria may also be used in the context of concessions and public contracts not fully covered by the Public Procurement Directives.

In the area of social services of general interest clarifications on possible selection and award criteria have been made in the Commission Staff Working Document 'Frequently asked questions concerning the application of public procurement rules to social services of general interest' ([30]).

2.3.5. *Specific elements of statutes and articles of association, the shareholder agreement and the public contract or concession*

The principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition ([31]). In the context of the founding of an IPPP, this obligation implies, in the view of the Commission, that the contracting entity should include in the contract notice or

([21]) See Article 29 of Directive 2004/18/EC.
([22]) See recital 31 of Directive 2004/18/EC.
([23]) See Articles 30 and 31 of Directive 2004/18/EC.
([24]) See for example Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 15, 23.1.1993, p. 33).
([25]) See Articles 41 *et seq*. of Directive 2004/17/EC and Articles 35, 36 and 58 of Directive 2004/18/EC.
([26]) Case C-324/98, Telaustria, ECR 2000, I-10745, paragraphs 60 and 61.
([27]) Case C-19/00, SIAC Constructions, ECR 2001, I-7725, paragraphs 41-45; Case C-31/87, Beentjes, ECR 1988, page 4635, paragraphs 29 *et seq*.
([28]) Even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the contracting entity (and this will often be the case for IPPP), such modifications may not relate to the basic requirements of the project and must be delimited.
([29]) Articles 45 to 48 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.
([30]) See footnote 8 above.
([31]) Case C-324/98, Telaustria, see footnote 26 above, paragraph 62; Case C-458/03, Parking Brixen, see footnote 9 above, paragraph 49.

the contract documents basic information on the following: the public contracts and/or concessions which are to be awarded to the future public-private entity, the statutes and articles of association, the shareholder agreement and all other elements governing the contractual relationship between the contracting entity and the private partner on the one hand, and the contracting entity and the future public-private entity on the other hand. If the contracting entity applies the competitive dialogue or the negotiated procedure, some of this information may not need to be fixed in advance but could be left to be identified and defined during the dialogue or the negotiation with the candidates. The call for competition should include some information on the intended duration of the public contract or concession to be performed by the public-private entity.

In the Commission's opinion, the principle of transparency requires the disclosure in the tender documents of optional renewals or modifications of the public contract or concession initially awarded to the public-private entity and the disclosure of optional assignments of additional tasks. The tender documents should cover at least the number and conditions of these options. The information thus provided should be sufficiently detailed, in order to ensure fair and effective competition.

It is advisable that the contract between a contracting entity and the private partner determines from the outset what happens if the public-private entity does not receive public contracts in the future and/or public contracts which have already been awarded are not extended. In the view of the Commission the statutes and articles of association should be so formulated that it is possible to change the private partner in the future. As the private partner cannot automatically be excluded from participating in a renewed tender procedure, the contracting entity must pay in such a case particular attention to the obligation of transparency and equal treatment of all bidders.

3. **THE PHASE AFTER FOUNDING OF THE IPPP**

The ECJ held that companies, the capital of which is open, at least in part, to private parties are precluded from being regarded as structures for the 'in-house management' of public services on behalf of the contracting entities which form part of them ([32]). This means that procurement rules, whether derived from the EC Treaty or from the Public Procurement Directives, must also be respected when awarding to the public-private entity public contracts or concessions, other than those public contracts and concessions that have already been subject to competition in the tender procedure for the founding of the IPPP in question. In other words, IPPP must remain within the scope of their initial object and can as a matter of principle not obtain any further public contracts or concessions without a procedure respecting Community law on public contracts and concessions.

However, as the IPPP is usually set up to provide a service over a fairly long period, it must be able to adjust to certain changes in the economic, legal or technical environment. Community provisions on public procurement and concessions do not rule out the possibility of taking into account these developments as long as the principles of equal treatment ([33]) and transparency ([34]) are upheld. Thus, should the contracting entity wish, for specific reasons, to be able to amend some conditions of the invitation to tender after the successful tenderer has been selected, it is required expressly to provide for that possibility, and for the relevant detailed rules, in the notice of invitation to tender or in the tender documents and to define the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders ([35]).

Changes to essential terms of contracts not provided for in the initial tender documents require a new procurement procedure ([36]). The ECJ considers the terms of a contract as essential, particularly if it is a condition which, had it been included in the contract notice or the tender documents, would have made it possible for tenderers to submit a substantially different tender ([37]). Examples of such essential terms of a contract include the scope of the works undertaken or services performed by the contractor or the charges levied on the user of the service provided by the contractor.

([32]) Case C-231/03, Coname, ECR 2005, I-7287, paragraph 26; Case C-410/04, ANAV, see footnote 14 above, paragraph 32.
([33]) See, *inter alia*, Joined Cases C-285/99 and C-286/99, Lombardini and Mantovani, ECR 2001 I-9233, paragraph 37, and Case C-315/01, GAT, ECR 2003, I-6351, paragraph 73.
([34]) See, *inter alia*, Case C-92/00, HI, ECR 2002, I-5553, paragraph 45, and Case C-470/99, Universale-Bau and Others, ECR 2002, I-11617, paragraph 91.
([35]) Case C-496/99 P, Commission v CAS Succhi di Frutta SpA, ECR 2004, I 3801, paragraph 118.
([36]) Case C-337/98, Commission v France, ECR 2000, I-8377, paragraph 50.
([37]) Case C-496/99 P, Commission v CAS Succhi di Frutta SpA, see footnote 35 above, paragraphs 116 *et seq*.

It should be pointed out that, as far as public contracts fully covered by the Directives and works concessions are concerned, secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered may be awarded directly, without a call for competition ([38]).

Under EC law, a public-private entity is — like any other economic operator — free to participate in public tenders ([39]). This also applies to tendering procedures which have become necessary as a result of a major amendment to or extension of those public contracts or concessions which the public-private entity was awarded in the past by the contracting entity that set it up. In such a case, the contracting entity must pay particular attention to the obligation of transparency and equal treatment of all bidders. Specific safeguards have to be taken to ensure a strict separation of those preparing the call for tenders and deciding on the award of the contract within the contracting entity, on the one hand, and those managing the IPPP, on the other hand, and that no confidential information is passed on from the contracting entity to the public-private entity.

([38]) Articles 31 and 61 of Directive 2004/18/EC and Article 40 paragraph 3(f) and (g) of Directive 2004/17/EC. In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives, such as service concessions as well (See Opinion of Advocate General Jacobs in Case C-525/03, Commission v Italy, paragraphs 46 to 48). The Commission considers as a matter of principle that modifications of essential terms of service concessions not catered for in the tendering documents are acceptable only if they are made necessary by unforeseen circumstances, not attributed to any of the contracting parties, or if they are justified on grounds of public policy, public security or public health (Article 46 EC Treaty).

([39]) Recital 4 to Directive 2004/18/EC requires Member States to ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.