

EU CLARIFICATION ON PUBLIC PRIVATE PARTNERSHIPS

This Guidance is aimed at providing further information on Public Private Partnerships and is based on the European Commission's most frequently asked questions on public procurement.

WHAT ARE PUBLIC PRIVATE PARTNERSHIPS?

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 cooperating 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 a 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 consideration for having erected the construction or delivered the service. The main difference as regards public procurement is the risk inherent in such exploitation which the concessionaire, usually providing funding for at least part of the relevant project, 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.

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.

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.
- 2 Legislation spelling out the obligations emanating from general EC Treaty principles.

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.

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 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 (ECJ).

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 an initiative would not aim at amending existing sector-specific Community regulation covering the award of concessions in the respective sectors.

WHAT ARE INSTITUTIONALISED PPPs?

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

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 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, to avoid the risk of establishing IPPPs which might turn out to be non-compliant with EC law. Only a 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.

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 were:

- 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.

WHAT DOES THE COMMISSION PROPOSE TO MAKE THE CHOICE OF PRIVATE PARTNERS FOR PPPs MORE TRANSPARENT AND COMPETITIVE?

For IPPPs 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.

At present, the in-house definition is determined by case law of the European Court of Justice. 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 IS COOPERATION 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 applicable 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 cooperation 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 and 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.

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