

# Public-private partnerships and Community law on public procurement and concessions

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**PURPOSE :** to present a Communication on Public-Private Partnerships (PPPs) and Community Law on Public Procurement and Concessions.

**CONTENT :** this document follows on from the Commission's Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (COM(2004)0327).

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.

The Green Paper was launched since it was considered necessary, in view of the increasing importance of PPPs, to explore the extent to which existing Community rules adequately implement these objectives when it comes to awarding PPP contracts or concessions. The purpose was to enable the Commission to assess whether there is a need to clarify, complement or improve the current legal framework at European level. 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.

The responses from stakeholders following the Green Paper suggest that only a few of the subjects raised require follow-up initiatives at EC level. These include, in particular:

- the award of concessions and
- the establishment of undertakings held jointly by both a public and a private partner in order to perform public services (Institutionalised PPPs – IPPPs).

**Concessions:** 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. Comments indicate that the existing Interpretative Communication (adopted in 2000) 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.

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.

The Commission discusses **the content of a possible Community initiative on 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.

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.

**Institutionalised PPPs:** 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). 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.

The Commission discusses **the content of a possible Interpretative Communication on institutionalised PPPs**. This should, above all, clarify the application of public procurement rules:

- to the establishment of mixed capital entities the objective of which is to perform services of general (economic) interest and
- 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. With regard to IPPPs the PPP Green Paper discussed in-house relations. 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 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. The Commission discusses the in-house concept in the Stadt Halle case of January 2005.

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 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.

Clarification is also needed in order to identify to what extent Community law applies to the delegation of tasks to public bodies, and which forms of co-operation remain outside the scope of internal market

provisions. The European Court of Justice has 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.

The interpretative document on IPPPs is envisaged for the course of 2006. The Commission services will also conduct an in-depth analysis of the impacts of a possible legislative initiative on concessions in 2006.