

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

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The European Parliament adopted a resolution based on the own-initiative report by Barbara **Weiler** (PES, DE) and welcomed the various Commission papers on this matter. It considered it premature to assess the effects of the public procurement directives and was against a review of these directives. Parliament opposed the creation of a separate legal regime for PPPs but considered that there was a need for legislative initiatives in the areas of concessions, respecting the principles of the internal market and threshold values and providing simple rules for tendering procedures. It agreed that there was a need for clarification with regard to institutionalised public-private partnerships (IPPPs).

Parliament called on the Commission, in regulating future PPPs and in the current impact assessment of the legal provisions on concessions, to give serious consideration to regional self-government interests and to involve representatives of regional as well as local interests in drawing up future rules.

As a matter of principle the law on public procurement should be applied whenever a private partner is to be selected. Parliament felt that when tasks have been satisfactorily carried out with the assistance of private partners, restoring them to the municipal sphere of responsibility cannot constitute a sound alternative to PPPs which is consistent with competition principles. Municipalities and their subsidiaries should be permitted to be exempted from the competition principles only when they are carrying out their purely local tasks which bear no relation to the internal market. Parliament emphasised the importance of transparency, which should entail the right of elected representatives to inspect agreements and documents. Parliament opposed the establishment of a European agency for PPPs, but welcomed other ways of sharing experience concerning best and worst practices, such as the networking of national and regional authorities responsible for the management of PPPs. It also opposed the creation of rules on the award of public procurement contracts beneath the threshold values at EU level.

**PPPs as public contracts** : Parliament shared the Commission's view that in the award of public construction or service contracts, the selection and commissioning of the private partner should as a matter of principle be governed by the public procurement directives if that selection and the award of the contract are concurrent. It favoured awarding contracts by means of a competitive dialogue where a contract entails 'legal and financial complexity', and called on the Commission to clarify this condition in such a way as to allow the maximum possible room for negotiation.

**PPPs as concessions** : Any legislation proposed by the Commission should allow public authorities to choose the best partner according to criteria which are defined in advance. Concessions should be defined as distinct from public contracts. Parliament supported the Commission in its efforts to ascertain whether standard procurement rules should be created for all PPPs on a contractual basis, irrespective of whether the PPPs concerned qualify as a public contract or a concession.

**IPPPs and "in-house relations"**: Parliament supported the Commission's efforts to take action in the field of IPPPs in view of the clear signs of existing legal uncertainty. In view of the widespread legal uncertainty that has grown up as to the application of in-house criteria, it called on the Commission to devise criteria, based on the current case-law of the Court of Justice, that establish a stable frame of reference for public authority decision-making, and to consider the possibility of incorporating these criteria into Community legislation. It felt that a threshold value, however defined, for the minimum stake

of a public contracting authority in an undertaking whose capital is held jointly with private partners, would result in certain permanent protected stakes and that any limit put forward for discussion consequently poses problems.

**Cooperation between public authorities:** Parliament welcomed as a general principle some form of cooperation at local authority level, not least to bring about synergies, as long as this does not enable abuse leading to market closure. It felt that the Commission must clarify the legal uncertainty regarding cooperation between public authorities which has arisen as a result of the jurisprudence of the Court of Justice.